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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners and Cross-Respondents,
vs.
ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Catholics United for Life, Orthodox Christians for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, American Baptist Friends of Life, Baptists for Life, Lutherans For Life, WELS Lutherans for Life, United Church of Christ Friends for Life, Disciples for Life, Nazarenes For Life, Task Force of United Methodists on Abortion and Sexuality, Concerned Women for America, the American Center for Law and Justice, the Catholic League for Religious and Civil Rights, and the Christian Action Council as Amici Curiae in Support of Respondents and Cross-Petitioners

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INTEREST OF AMICI

Catholics United for Life

Catholics United for Life (CUL) is the pro-life apostolate of the St. Martin de Porres Dominican Community. Formed in 1974, CUL has twenty-two affiliates across the country, and promotes sidewalk counseling, a technique it developed for saving babies from abortion. Sidewalk counselors work to save each individual baby threatened by abortion — through prayer, persuasion, offers of assistance, and distribution of literature. CUL also supplies literature on a national level to promote respect for all human life.

Orthodox Christians for Life

Orthodox Christians for Life is a religious-educational prolife organization consisting of members from all jurisdictions of the Eastern Orthodox Church in the United States and Canada. It was founded and functions in a spirit of synergistic cooperation with the hierarchy, clergy, and laity of the Orthodox Church regardless of jurisdiction or geographical location. The organization supports the doctrines and canons of the Church. Its activities have included the recent coordination and creation of an Amicus Brief submitted to the United States Supreme Court on behalf of the Holy Orthodox Church in *Webster v. Reproductive Health Services* (No. 88-605).

In its moral teachings, the Orthodox Church has had a long and continuous history of outspoken condemnation of abortion which dates back to Apostolic times. In fact, the humanity of the unborn child, his "personhood," and his possession of a soul from the moment of conception have been universally understood in the Eastern Church from the earliest times; these understandings remain unchanged and unchallenged in Orthodox theology to this day.

The Holy Orthodox Church remains a unique witness to historical Christianity's understanding of the sacredness of human life: that the unborn are indeed "persons" and that abortion is considered an act of premeditated murder. Orthodox Chris-

tians for Life supports and advocates these historical positions and promotes them not only to the faithful, but to the secular culture at large.

National Organization of Episcopalians for Life

National Organization of Episcopalians for Life Research and Education Foundation, Inc. (NOEL), a non-profit Maryland corporation with national offices in Fairfax, Virginia, is a general organization of the Episcopal Church. NOEL's purposes affirm the sacredness and the right to life of all human beings from conception to natural death. NOEL supports the 1988 General Convention Resolution of the Episcopal Church which "emphatically oppose[s] abortion as a means of birth control, family planning, sex selection or any reason of mere convenience," promotes alternatives to abortion, including adoption, and assists those faced with problem pregnancies through its 121 chapters in 36 states.

Presbyterians Pro-Life

Presbyterians Pro-Life is organized within the Presbyterian Church (USA), a denomination with nearly three million members. Its objectives are to proclaim the Church's obligation to protect all innocent human life from conception to natural death and to support women in crisis pregnancies by offering alternatives to abortion. It is governed by a board of directors of lay men and women and pastors, all members of the Presbyterian Church (USA). It has a network of local chapters throughout the denomination and publishes a quarterly newsletter that reaches 25,000 families and churches.

American Baptist Friends of Life

American Baptist Friends of Life is a pro-life advocacy organization within the American Baptist Churches/USA, representing the pro-life position of a large percentage of American Baptists. Directed by an eight member executive committee, it publishes a regular newsletter and is taking leadership in the implementation of its new denominational resolution on abortion passed in June of 1988 which states, "as American Baptists, we oppose abortion as a means of avoiding responsibility for conception."

Baptists for Life

Baptists for Life is a Christian pro-life organization representing independent Baptist Churches throughout the United States with main offices in Grand Rapids, Michigan. Baptists for Life believes in the sacredness of human life at every stage of biological development and in its value throughout the life continuum. It exists to provide alternatives to abortion through the over 2,000 church congregations which it represents.

Lutherans For Life

Lutherans For Life is a national, pan-Lutheran, pro-life organization founded in 1978. In addition to individual members, there are some 280 local chapters across North America engaged in a wide variety of educational and compassionate efforts.

Lutherans For Life believes that the Church is compelled by God's Word to speak and act on behalf of those who are vulnerable and defenseless. The crisis of our time is the repudiation of Biblical truth manifested in the wanton destruction of innocent human life through legalized abortion-on-demand and the growing threat to the lives of others through legalized assisted suicide and euthanasia. Therefore, as Lutherans For Life, we strive together to give witness, from the Biblical perspective, to the Church and society on these and related issues such as chastity, postabortion healing and family living.

LFL assists Lutheran individuals and congregations to work and witness for life. We produce a wide-variety of educational materials; publish a newsletter and magazine; host a national convention and numerous seminars and workshops. State and local chapters support a wide range of compassionate outreaches such as the post-abortion outreach *Healing Hearts* or the crisis pregnancy support ministries *The Guide Program* and *The Tender Shepherd Program*. LFL also produces a nationwide pro-life radio program on the *Jubilee Network* (TM).

WELS Lutherans for Life

WELS Lutherans for Life is para-synod organization in fellowship with the 440,000 member Wisconsin Evangelical

Lutheran Synod (WELS). WELS Lutherans for Life consists of 26 chapters and 20 congregational branches throughout the United States. WELS resolved at its 1979 synod convention that "the Holy Scriptures clearly teach that the living yet unborn are persons in the sight of God . . . and that we continue to urge our membership to make God's will in this matter known." WELS Lutherans for Life is that specialized ministry which seeks to make known God's will of life and to provide assistance to others in all life issues.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group recognized by the General Synod of the United Church of Christ. Since the General Synod has taken a pro-choice/pro-abortion stand, UCC Friends for Life upholds the sanctity of human life from conception to natural death and encourages the Church to protect unborn children while providing abortion alternatives to women in crisis pregnancy. This belief is proclaimed in quarterly newsletters and a recently published book, *Affirming Life*. A growing pro-life network within the denomination works to educate its members and provide compassionate ministry.

Disciples for Life

Disciples for Life is a pro-life advocacy organization made up of members of the Christian Church (Disciples of Christ). It provides a monthly column in the publication: 'Disciple Renewal,' supplies educational materials to the church, and is establishing chapters throughout the denomination. Disciples for Life promotes the sanctity of human life and opposes abortion on demand.

The structure of the Christian Church (Disciples of Christ) is such that the official statements and actions of the highest (or general) level does not necessarily reflect the diversity of its one million members; it is a denomination that emphasizes freedom and autonomy to its members and churches. Its general level endorsement for abortion on demand is a position at odds with many in the church.

Nazarenes For Life

Nazarenes For Life is composed of laymen who have come together to support the pro-life stand that we see the Scriptures reveal, and which the manual of the Church of the Nazarene supports. We therefore have accepted the challenge to become involved in educating the church on pro-life and pro-family issues, supporting existing pro-life organizations within our area, and providing a support network to women and families in need.

To fulfill this purpose, we have worked in many areas including the following:

1. Invited guest speakers, sponsored seminars, classes, and special presentations to large and small groups.
2. Supported homes for pregnant women and Crisis Pregnancy Centers.
3. Supplied literature and videos on abortion, abstinence, sexually transmitted diseases, and help for the post-abortal woman.
4. Actively counseled women in crisis pregnancy as well as women suffering from past abortions.
5. Worked to educate pastors, church leaders, and laymen on the realities of abortion in today's world, and on the personhood and humanity of the unborn.
6. Encouraged a more active role by the church body in taking a stand on the moral issues of our day.

Task Force of United Methodists on Abortion and Sexuality

The Task Force of United Methodists on Abortion and Sexuality is a national network of over 5,800 pastors, theologians, churches, and laity dedicated to minister to the deepening problems of abortion recidivism and abortion-as-contraception. The view that "life does not begin until live birth" does not represent the position of a large segment of the United Methodist Church. According to our Discipline, only our General Conference speaks the position of the Church, *not* our General Board of Church and Society *nor* our Women's Division. Furthermore, it is recognized that our *Book of Discipline* is the primary source of

order and purpose in the Church, not our *Resolutions*. Since 1972, General Conference has asserted in the *Book of Discipline* "our belief in the sanctity of unborn human life." Then in 1988, General Conference stated in *Book of Discipline* paragraph 71G that "We recognize tragic conflicts of life with life that may justify abortion and in such cases support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection." That abortion involves human life before birth is signified by the phrase "conflicts of *life* with *life*" (emphasis added). That abortion should be restricted to minimize indiscriminate practice is signified by saying that "we cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection."

Concerned Women for America

Concerned Women for America ("CWA") is an national, nonprofit organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn.

American Center for Law and Justice

The American Center for Law and Justice is a national public interest law firm, chartered to enter the legal arena on issues of a broad public interest. The American Center has members in all fifty States. Attorneys from every State of the Union have affiliated with the American Center, to assist in the restoration of pro-liberty, pro-life and pro-family values.

On behalf of its members, the American Center calls for an end to the systematic exploitation and victimization of women

by the abortion industry, and an end to the holocaust of the destruction of our progeny.

Catholic League for Religious and Civil Rights

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination. The Catholic League is committed to ensuring the American people's continued enjoyment of the strong protection afforded religious liberty by the religion clauses of the First Amendment, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

Christian Action Council

The Christian Action Council (CAC), founded in 1975 as a Protestant evangelical pro-life organization, is incorporated in the District of Columbia. Since its founding, the CAC has established 400 crisis pregnancy centers around the country. These crisis pregnancy centers serviced more than 200,000 women in 1990, providing them with support, encouragement, and necessary services to enable them to carry their babies to term. The CAC also counsels and supports women who suffer from the aftermath of abortion. CAC has 120 local CAC affiliate chapters that are activist-oriented and involved politically in promoting pro-life legislation and seeking a reversal of *Roe v. Wade*.

The parties to the present case have consented to the filing of this brief; letters granting consent are being filed with this Court.

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SUMMARY OF ARGUMENT

This case presents a challenge, by Planned Parenthood of Southeastern Pennsylvania and others (hereinafter, "Planned Parenthood"), to various Pennsylvania statutes alleged to violate a constitutional "right" to abortion. The threshold question, as the court below acknowledged, is the proper standard of review for analyzing alleged violations of a right to abortion. This standard, in turn, depends upon the status of the asserted abortion liberty and whether abortion is a constitutional right at all.

Planned Parenthood's challenge must fail. The fourteenth amendment secures no "right" to abortion. On the contrary, this amendment guarantees the right to life of all human beings, a right which is fundamentally inconsistent with any claim of an abortion right.

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of this Court held that unborn children are not "persons" with rights under the fourteenth amendment to the United States Constitution, and that the fourteenth amendment includes a right to abortion. As demonstrated in this amicus brief, the *Roe* Court erred on both counts. This Court should now repudiate the exclusion of unborn children from constitutional protection, and overrule *Roe v. Wade*.

The fifth and fourteenth amendments secure protection for the minimum human rights a state must respect: the rights to life,

liberty, and property. These amendments would be of little value, however, if those invoking their guarantees had to prove their explicit entitlement to constitutional protection. Rather, these amendments apply to all living human beings *by virtue of their humanity*.

No valid basis exists for excluding human beings conceived but not yet born from the protection afforded "persons" under the Constitution.

The *Roe* Court offered no defensible justification for such an exception. The alleged absence of precedents for the personhood of unborn children is not only incorrect, but also irrelevant in view of the similar dearth of such precedents for any other class of humans. The postnatal applicability of some provisions of the Constitution referring to "persons" does not imply that those excluded, e.g., from eligibility for Congress or for citizenship, are not persons; moreover, the assertedly ambiguous scope of other constitutional provisions referring to persons provides no basis for anything but circular arguments as to their scope. The alleged inconsistency of exceptions in state anti-abortion laws with the personhood of unborn children merely identifies possible constitutional defects in those laws; such defects do not justify the categorical exclusion, from all constitutional protection, of the class suffering discrimination. The supposed laxity of state abortion legislation in much of the nineteenth century is historically misleading because it ignores the fact that stringent anti-abortion legislation, largely representing a response to the scientific discovery of the humanity of unborn children from the moment of fertilization, preceded and accompanied passage of the fourteenth amendment. Furthermore, even prior to this legislation, abortion was illegal at common law and, until after the technical developments of the late eighteenth century, practically unavailable and virtually suicidal.

Contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the fifth and fourteenth amendments. The framers of those amendments clearly drew no distinction between "persons" and biological "human beings." Science demonstrates that each individual member of the human race begins life at the moment of fertilization. Logic supports no essential distinction between human beings on the basis

of their dwelling inside or outside the maternal womb, or on the basis of their status as "viable" or "nonviable" individuals. Legal consistency supports the rejection of distinctions, in matters of basic rights, between born and unborn children, as well as between "viable" and "nonviable" unborn children. Finally, the intrinsic sanctity of every human life compels the rejection of any arbitrary exclusion of unborn children from entitlement to the most basic of human rights.

This Court should overrule *Roe v. Wade*. Any challenge to the Pennsylvania statutes predicated upon a supposed right to abortion must accordingly fail.

A challenge to certain of the Pennsylvania statutes might rest on the basis that these statutes provide *insufficient* protection for unborn persons. Planned Parenthood has not raised or indicated any wish to raise such constitutional objections; nor would Planned Parenthood likely have standing to do so. The Attorney General of Pennsylvania, however, who is a party to this case, may have authority to vindicate the rights of unborn children. This Court should therefore uphold the personhood of children conceived but not yet born, and set this case for further briefing and reargument on the question of the proper disposition of this appeal.

ARGUMENT

Planned Parenthood challenges the state statutes at issue in this case on the basis of a supposed federal constitutional right to abortion under the fourteenth amendment. *See* Brief for Petitioners and Cross-Respondents §§ I, IV. The fourteenth amendment, however, contains no "right" to abort developing human offspring. On the contrary, that amendment explicitly secures the rights to life and to equal protection for every human being.

As demonstrated in this brief, the term "person" as used in the fourteenth and fifth amendments applies to all human beings, including those conceived but not yet born. Accordingly, there can be no "right" to abort such persons under either the fourteenth or the fifth amendments. Planned Parenthood's claim predicated upon such a nonexistent "right" must fail.

I. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.

The fifth amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XI, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings not be read out of the terms of these amendments.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their straightforward and faithful application.

If there were ever a term whose broad scope demands unconditional respect, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a non-person has *no* rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fifth and fourteenth amendments. Yet these are certainly persons. *E.g., City of Cleburne v.*

Cleburne Living Center, Inc., 473 U.S. 432 (1985) (discrimination against mentally retarded persons triggers equal protection scrutiny). Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their particular inclusion under the fifth and fourteenth amendments, but because they are included *by virtue of their humanity*.[1] "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons'" within the meaning of the Constitution. *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They are "a form of human life," *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution.[2] Nor

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[1] The importance of this fundamental point cannot be stressed enough:

> The idea of human rights is based upon the notion that certain rights obtain *by virtue of being human* and *may be conditioned upon no other requirement*. An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights" . . . .

Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 10 n.58 (emphasis added).

[2] As the Supreme Judicial Court of Massachusetts explained in a different context,

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb. . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Commonwealth v. Cass, 392 Mass. 799, _____, 467 N.E.2d 1324, 1325 (1984) (construing vehicular homicide statute).

does any justification exist for the arbitrary exclusion of such children from the protection of basic human rights under the Constitution.

II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), a majority of this Court read into the term "person" in the fourteenth amendment an exception for unborn children.[3] There is no valid justification for the creation of such an exception.

A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

1. Alleged absence of precedent

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. at 157.

This observation is factually incorrect. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for *here there is an embryo or fetus* incapable of protecting itself.

[3] "The primary question presented in *Roe* was this: may the Court create substantive exceptions to the enjoyment of fundamental rights where none appear in the Constitution?" Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1288 (1975).

Id. at 745-46 (emphasis added). As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *id.* at 746-47.

Moreover, as a legal matter, an absence or dearth of case support for unborn personhood is irrelevant. There may well not be any cases, for example, holding newborn infants to be persons. This obviously does not mean, however, that such children are beyond the scope of the fourteenth or fifth amendments. As discussed above, such a cramped construction of the text would largely negate the effect of these amendments.

2. Postnatal application of other constitutional provisions

Second, the Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157 (footnote omitted). But this simply begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they apply. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Moreover, those provisions — like the fifth and fourteenth amendments — that *can* apply to unborn children,[4] *e.g.*, *id.* art. I, § 9, cl. 1 (tax on importation of

[4] It bears mention that the holding of an office need not, in theory, be limited to competent adults. History, for example, has seen numerous infants wear the royal crown. Furthermore, unborn children have been explicitly recognized as capable of serving as the executor of an estate. H. Storer, *Criminal Abortion in America* 92 (1860) ("an infant in utero . . . at every stage of [gestation], no matter how early, . . . may be appointed executor . . . "). *Accord Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (Ch. 1798).

"persons"); *id.* amend. IV (security of the person against unreasonable searches and seizures), contain no exclusion for any particular class of children, born or unborn.

3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .
>
> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]?

Roe, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

The government, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons.[5] This fundamental obligation does not disappear simply because the

[5] Whether an exception for the life of the mother would entail a denial of equal protection would depend upon the scope of that exception. There is a grave moral and legal difference between, on the one hand, allowing a physician to remove an ectopic pregnancy or cancerous uterus from a pregnant woman, with the death of her unborn child occurring as an unintended effect of that necessary operation, and, on the other hand, giving permission for the direct, intentional killing of the unborn child whenever such is claimed to be necessary to save the mother's life.

The total exemption of the pregnant woman herself from the scope of criminal prohibitions against abortion would, like total parental immunity from prosecution for serious child abuse, be unconstitutional. *But cf.* Gorby, *supra* note 1, at 20 (lenient treatment of women who abort and reduced levels

(cont'd on next page)

government fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation.

Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), "the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state or federal government in fact denies due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny that members of the victimized class are persons. To hold otherwise would be to deny the possibility of unconstitutional action by government, and to turn civil rights litigation upside down.

4. Alleged laxity of nineteenth century abortion laws

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

of punishment for offense of abortion not inconsistent with personhood of unborn victim of abortion); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (sustaining, against equal protection challenge, statutory rape law that only applied to male offenders). Prosecutorial discretion, of course, is fully capable of handling situations in which the mother is more accurately considered a victim instead of an offender.

The primary effect of holding the unborn child to be a person would be that the child could no longer be regarded as beyond the equal protection of the criminal law. In other words, if all of the elements of a statute defining an offense against a person were satisfied, the statute could not be held inapplicable simply because the victim was not yet born.

The state may properly create a separate and additional offense of abortion which could apply without proof of pregnancy or causation of fetal death. *See infra* note 14.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period"); *see also id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, simply ignores reality. As Professor Joseph W. Dellapenna has demonstrated, the primitive state of medical technology meant that, prior to the late eighteenth century, abortion techniques were either ineffective or so dangerous as to be practically suicidal. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 371-76 (1979).[6] Thus, while abortion was indeed unlawful at common law, prosecutions were infrequent because they were unnecessary. Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137, 146 (D. Horan, E. Grant & P. Cunningham eds. 1987).

> During this period, techniques to induce abortions were either magical, and hence punishable as witchcraft (whether they were successful or not), or extremely crude invasions of the woman's body, likely to be fatal to the woman as well as to the fetus. In the few cases where an abortionist was punished, it was for killing the mother. In fact,

[6] It would therefore be nonsensical to claim that women had a legal "liberty to abort" during the period preceding enactment of the fifth amendment.

> there is no evidence of voluntary abortion during this time. Abortions, if they occurred, seem to have resulted from assaults upon women rather than by their choice. Even then, abortion prosecutions were hampered by ignorance of medical knowledge about the gestation process. The net result of these circumstances was that abortion was rare and the law did not have to deal with it because hanging the abortionist for killing the mother was sufficient punishment for the few cases that did arise.

Id. at 145 (footnotes omitted). The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). When new abortion techniques finally became available in the late eighteenth century, the result was the initiation of anti-abortion legislation. *Id.* at 146. This legislative movement subsequently expanded in response to embryological discoveries that identified fertilization as the beginning of human life. *Id.* at 147.[7]

B. No Other Basis Exists For Creating an Exception for Unborn Children.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth amendment. Nor does any valid justification appear from other sources. On the contrary, history, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.

1. The framers of the fourteenth amendment did not distinguish between "human beings" and "persons."

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they

[7] Another scholar has analyzed the scope, terminology, penalty provisions, statutory classification and context, and history of anti-abortion legislation in the nineteenth century to demonstrate that "the legislatures ratifying the fourteenth amendment did consider human fetuses to be persons." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 31 (1985) (providing extensive legal and historical analysis).

were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment.[8]

If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding the thirteenth and fourteenth amendments and the post-war civil rights legislation, it is that the legislators considered personhood and biological humanity to be interchangeable terms.

Thus Representative Thaddeus Stevens, on the day the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person.*" Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[9]

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[8] The same conclusion applies to the framers of the fifth amendment. The founding fathers considered even slaves to be persons. *See* U.S. Const. art. I, § 2, cl. 3 (distinguishing between "free Persons" and "other Persons" for purposes of apportionment of taxes and legislators). There is no reason to believe that these same men, when adding the fifth amendment, denied the personhood of certain human beings. Indeed, the framers of the fourteenth amendment, who clearly repudiated the notion of a distinction between "persons" and "human beings," *see infra*, saw their work as the vindication, not the rejection, of the political theory of the framers of the Bill of Rights.

[9] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); *id.* at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); *id.* at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); *id.* at 1151 (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

There is, therefore, no warrant for the conclusion that a class of human beings might be excluded from the persons protected under the fourteenth amendment. As forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

2. Science rejects the exclusion of unborn children from the class of human beings.

Science does not purport to identify the value society should place upon human life. Science does indisputably show, however, that each individual human organism begins life at the moment of fertilization. *See generally* Krimmel & Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. Cin. L. Rev. 725, 744-62 (1977) (analysis of biochemical and genetic evidence shows that the life of a specific human being begins at conception). Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the Constitution.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no

> nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

This principle of continuous development is not unique to human beings.

> In biology and in medicine, it is an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization — the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote. The zygote is the starting cell of the new organism.
>
> . . . It is important to also remember . . . that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them.

The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16 (1982) (testimony of Dr. Micheline Mathews-Roth, principal research associate, Dept. of Medicine, Harvard Medical School) (emphasis added). The conclusion in the case of human life rests, therefore, not only upon human embryological research, but upon the findings of a broad area of biological study.

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 17. *Accord* W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972) ("the fusion of two germ cells . . . one, the spermatozoan from the male parent; the other, the ovum from the female parent . . . is the formation of the first cell of the new individual, the zygote"); L. Arey, *Developmental Anatomy* 55 (7th

ed. 1974) (union "of a male and female sex cell . . . definitely marks the beginning of a new individual"); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1 (2d ed. 1977) (a zygote "results from fertilization of an oocyte by a sperm and is the beginning of human life").[10]

Science cannot identify a spiritual soul or assign a moral value to a given creature. Science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

3. Logic militates against the creation of an exception for unborn children in the term "person."

According to *Roe v. Wade*, unborn children are non-persons, and aborting such children is a constitutional right. But it is plainly absurd to draw so tenuous a border as birth (or, for that matter, viability) between what is a constitutional liberty and what is homicide.

First of all, the act of abortion itself cannot sensibly be what distinguishes between persons and non-persons. Presumably no member of this Court would deny that "a newborn infant, whether the product of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the fifth and fourteenth amendments.

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[10] *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973):

> During fertilization, sperm and egg pool their nuclei and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

322 F. Supp. at 1252 (citations omitted). *Accord Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court); *Presley v. Newport Hosp.*, 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

The point of detachment from the mother — whether by normal birth, induced delivery, or abortion — likewise fails as a logical point for creating an exception to personhood. For a considerable period prior to birth, the unborn child is viable, and thus capable of surviving premature delivery. The child of seven or eight months' gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.

The fourteenth amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification the boundaries of which are necessarily arbitrary.

Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in labor while traveling interstate gives birth in Texas today or Mexico tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain. "No governmental power exists to say that a viable fetus should not have every protection required to preserve its life." *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). As Senator Arthur S. Boreman explained in regard to the then recently enacted protections of the fourteenth amendment:

> This . . . is not confined to citizens of the United States, but it includes every person that is found within these States, and guaranties to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to *every person residing anywhere, everywhere*, within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) (emphasis added).

The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb.[11] Birth changes *where* the person is, not *what* the person is.

Nor does the concept of viability supply a logical alternative to birth as a boundary for excluding some unborn children from personhood.

> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur*.

Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 754 (1976).

Members of this Court have already strongly criticized reliance upon the concept of viability for drawing constitutional lines. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (plurality opinion). *See, e.g., City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) (point of viability is unstable because tied to contemporaneous

[11] Already *in vitro* fertilization, embryonic transfer, and surrogate motherhood have demonstrated beyond all doubt the fundamental biological independence of the newly conceived child from any particular woman, genetic mother or not, and the capacity of an unborn child to live outside of the womb altogether, if only for the initial stages of development. It is now clear, in other words, that intrauterine gestation is not even the first stage of life, but is merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child.

state of medical technology, and is therefore unsuitable as a basis for judicial decision making). Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to the state interest in protecting human life:

> The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted). The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

The very notion of viability as a criterion for denying legal protection is gravely flawed. Viability is not a transcendent concept — it refers to conditional circumstances. The Arctic explorer is viable *if* sufficiently clothed. The serious diabetic is viable *if* properly treated. The newborn, full-term infant is viable *if* fed and nurtured. And the unborn child is viable *if* not prematurely expelled from the necessary environment, be it a petri dish or a womb. To deny protection on the basis of one's need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship. *Roe* stripped protection from precisely those who most need the minimum safeguards of the Constitution. This is topsy-turvy jurisprudence.

4. Legal consistency would not be served by the exclusion of unborn children from the protection of the fifth and fourteenth amendments.

The integrity of the law is not served, but rather is harmed, by the arbitrary exclusion of unborn children from constitutional protection.[12] The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The creation of an exception to the fourteenth or fifth amendments which would deny protection to such children represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law.

The ordinary legal guardians of the civil rights to life, liberty, and property are the criminal law and the law of torts. In both of these areas of law, courts and litigants have struggled with, and to a large extent overcome, the absurdity and injustice of arbitrary distinctions between born and unborn children, and between viable and nonviable unborn children.

The common law is considerably older than contemporary knowledge of prenatal human development. Ignorance of fertilization and the nature of the human embryo consequently left its marks on the common law. In particular, the considerable problems of proof facing those alleging the perpetration of wrongs against unborn children led to the recognition of various arbitrary rules. These rules, for want of better guides, tied civil and criminal liability to observable phenomena such as quickening (the detection of the child moving in the womb) and live birth.

The criminal law has found it difficult to "outgrow" these arbitrary rules, presumably because of a combination of stare decisis, concern for advance notice to defendants of the criminality of particular conduct, and the rule of strict construction in favor of the defendant. *E.g., Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc). As a result, the general rule

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[12] Compounding the irony and absurdity of this arbitrary exclusion is the fact that this Court has held that *corporations* enjoy the status of "persons" under the fourteenth amendment. *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

today remains that the homicide of an unborn child cannot be established without proof that the mortally wounded infant survived, even if only momentarily, outside the womb. *See* Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971).[13] States have responded to this archaic requirement, however, by amending their criminal codes and specifying that the destruction of an unborn child is a crime.[14]

The law of torts has demonstrated a greater ability to "keep pace with the sciences," *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946) (allowing action for prenatal injuries), and to adjust its rules of liability in the face of increased scientific knowledge. Thus, for example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971). Likewise, the courts universally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978). Similarly, after a protracted struggle over the issue, the

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[13] *But see Commonwealth v Lawrence*, 404 Mass. 378, 536 N.E.2d 571 (1989) (homicide laws apply to slaying of viable unborn child); *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (viable unborn child is "person" under vehicular homicide statute); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (viable unborn child is "person" for purposes of criminal homicide); *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985) (applying involuntary manslaughter statute to death of viable unborn child).

[14] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1991) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. §§ 14:32.5-32.8 (West Supp. 1992) (feticide); Minn. Stat. Ann. §§ 609.2661-609.2665, 609.268(1) (West 1987 & Supp. 1992) (murder, manslaughter, and felony death of unborn child); N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1991) (murder, manslaughter, and negligent homicide of unborn child).

One of the curious consequences of the difficulties in proving destruction of unborn children was that the lives of such children could better be protected by laws prohibiting abortion *without* proof of pregnancy, destruction of the unborn child, or intent to destroy such child. The American Medical Association incorporated precisely these features into its model anti-abortion statutes in the nineteenth century. *See* 13 Transactions of the American Medical Association 41-42 (1860); H. Storer, *Criminal Abortion in America* 94, 97-100 (1860).

courts of a clear majority of jurisdictions — thirty-five states and the District of Columbia, with eleven states opposed, and four undetermined — now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. *Id.*[15] And while few courts have addressed the issue, already one state supreme court has convincingly argued that wrongful death liability cannot sensibly be

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[15] The following decisions allow recovery for the wrongful death of a viable unborn child: *Eich v. Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc); *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986); *Gorke v. Leclerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Polinquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984), *appeal after remand*, 427 N.W.2d 85 (N.D. 1988); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, *reh'g denied, id.*, 520 P.2d 361 (1974); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); *Vaillancourt v. Medical Center Hosp. of Vermont, Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mutual Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). One additional state, Tennessee, has legislated this result. *See* Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)). Thus, thirty-seven jurisdictions now allow recovery for the wrongful death of a viable unborn child.

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limited to wrongs inflicted upon *viable* unborn children. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).[16]

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *See generally* Bopp, Jr. & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 246-83 (1989) (survey of fetal rights in legal contexts other than abortion). *Roe* purported to constitutionalize the very same distinctions that the law of torts (and, to a lesser extent, crimes) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion business may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the difference between con-

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Disallowing recovery are the following: *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); *Milton v. Cary Medical Center*, 538 A.2d 252 (Me. 1988); *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977), legislatively overruled, Tenn. Code Ann. 20-5-106(c) (Supp. 1991); *Witty v. American Gen. Capital Distribs., Inc.*, 30 Tex. Sup. Ct. J. 244, 727 S.W.2d 503 (1987); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

The courts of Alaska, Arkansas, Utah, and Wyoming have not yet resolved the question.

[16] Another state has abolished the viability distinction by statute. Ill. Ann. Stat. ch. 70, para. 2.2 (Smith-Hurd 1989).

stitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fifth and fourteenth amendments.

5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has *every* right. But no one except a person has *any* rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1226 (E.D. La. 1970) (emphasis added), *vacated*, 412 U.S. 902 (1973). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing the law recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference relates to "our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2708 (1990) (internal quotation marks and citation omitted). As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby growing in the womb.

The answer to the fundamental moral issue is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

Roe v. Wade represents precisely such a radical departure from the history, indeed the founding principles, of this nation. Like *Betts v. Brady*, 316 U.S. 455 (1942), overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Roe* "made an abrupt break" with what "seems to us to be an obvious truth," *Gideon*, 372 U.S. at 344: "We hold these truths to be self-evident: that *all* men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are *Life*, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

The fifth and fourteenth amendments represent an "assurance . . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) (Rep. Bingham). As this Court explained in *West*

Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should now correct this fundamental injustice by overruling *Roe v. Wade* and upholding the right to life and equal protection of all human beings, regardless of age, size, health, or condition of dependency.[17]

III. THE PERSONHOOD OF THE UNBORN REQUIRES THE REJECTION OF PLANNED PARENTHOOD'S ATTACK UPON THE PENNSYLVANIA STATUTES.

The constitutional personhood of human beings conceived but not yet born dictates the rejection of Planned Parenthood's constitutional challenge to the Pennsylvania statutes at issue here.

Planned Parenthood predicates its challenge upon an alleged "abortion right," Brief for Petitioners and Cross-Respondents at 15. Such a "right," however, is fundamentally inconsistent with the right to life of persons conceived but not yet born. A "right" to abort, where the life of an unborn person is at stake, would make no more sense than "a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body," *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (plurality opinion). As this Court acknowledged in *Roe*, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S. at 156-57.

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[17] The Executive Branch has already recognized the "unalienable personhood" of unborn children as well as the fundamental importance of upholding the equal right to life of unborn children under the fifth and fourteenth amendments. Proclamation No. 5761, 3 C.F.R., 1988 Comp., p. 3. *See* Appendix (text of proclamation).

The personhood of unborn children imposes a duty upon the state to afford equal protection to humans conceived but not born. *Cf. DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) ("the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause") (citation omitted). "[L]egislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be discriminatory, as 'irrational,' and as inimical to the equal protection clause as the legislative classification of races." Byrn, *Abortion in Perspective*, 5 Duq. U.L. Rev. 125, 135 (1966-67). As Justice Stevens observed in the *Thornburgh* case, unless there is a "fundamental" difference between unborn and born human offspring, "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislatures." 476 U.S. at 779 (concurring opinion) (footnote omitted). "For the very idea that one may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See also Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").[18]

Thus, in view of the general prohibition of homicide, a proper litigant could challenge the constitutionality of laws which did *not* provide at least the minimum equal protection demanded by the fourteenth amendment: the outlawing of all abortions.

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[18] Furthermore, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (footnote omitted). The fifth amendment, while lacking an explicit guarantee of equal protection, nevertheless also "contains an equal protection component." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (citation omitted). "This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* (internal quotation marks and citations omitted). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983).

Planned Parenthood has not challenged the Pennsylvania statutes on this basis. Nor has Planned Parenthood indicated any desire to do so. Moreover, it is far from clear that this private entity, which is not a guardian of unborn children, and which promotes interests diametrically opposed to those of such children, could have standing to raise objections predicated upon the personhood of the unborn. The Attorney General of Pennsylvania, however, who is a party to this case, is a proper party to seek vindication of the rights of unborn persons. This Court should therefore hold that the fourteenth amendment protects unborn children as persons, and set this case for further briefing and reargument on the question of the proper disposition of this particular appeal.[19]

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[19] The challenged reporting requirements of the Pennsylvania statutes, 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214, are clearly constitutional. Such official gathering of information about abortion is entirely consistent with the constitutional rights of unborn persons.

On the other hand, statutes which affirmatively authorize abortions violate the fourteenth amendment. Any law which categorically permits the deliberate deprivation of an unborn child's life invidiously denies equal protection to such children. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989). Thus, the judicial bypass sections of the Pennsylvania parental consent statute, which provide that a judge "shall authorize" the abortion of a child under certain circumstances, 18 Pa. Cons. Stat. Ann. § 3206(c), (d), are unconstitutional.

Some of the challenged statutes expressly contemplate the commission of abortions, but may not in themselves affirmatively authorize abortions. *See* 18 Pa. Cons. Stat. § 3205 (informed consent), § 3206(a) (parental consent), § 3209 (spousal notice). If these laws were to be construed to authorize abortions, they would be unconstitutional. On the other hand, these laws could be construed to apply only to such abortions as are independently authorized under other provisions of law. Under this interpretation, the challenged sections would themselves pose no threat to the constitutional rights of unborn persons. Once laws permitting or authorizing abortions gave way to recognition of the constitutional rights to life and equal protection, laws merely assuming the legality of abortion would become, as applied to abortion, dead letters. Thus, a construction is readily available which saves, from facial unconstitutionality, laws which only presuppose the legality of abortion. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial constitutional challenge must establish that no set of circumstances exist under which statute is valid).

The statutory definition of a medical emergency, 18 Pa. Cons. Stat. § 3203, bears directly upon the circumstances under which abortions are

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This Court followed a similar course in the school desegregation cases. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court declared that racial segregation in public education violated the fourteenth amendment. The Court then set further proceedings to consider the implications of *Brown I* for the resolution of the particular cases before it. *See Brown v. Board of Educ.*, 349 U.S. 295, 298-99 (1955) (*Brown II*). Recognition of the constitutional rights of unborn children would, like the holding in *Brown I*, represent a very significant vindication of fundamental human rights. Thorough review of the ramifications of this holding, as well as the proper means of upholding these rights in the case at bar, would therefore be wise.

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permitted under the other statutory sections. The constitutionality of this statute therefore depends upon the scope of the emergency exception. The phrase, "death or . . . serious risk of substantial and irreversible impairment of bodily function" might be interpreted narrowly to encompass only those actions — removal of an ectopic pregnancy or a cancerous uterus, for example — which do not directly destroy the unborn child, which seek to preserve the life of the child if possible, and which result in the death of the child, if at all, only as an unintended consequence of an independently justified operation. The availability of such a narrow, constitutionally permissible construction suffices to defeat a facial challenge to the statute. *Salerno*, 481 U.S. at 745.

CONCLUSION

There is no valid basis for excluding unborn children from the fundamental protections afforded all persons under the fifth and fourteenth amendments to the United States Constitution. This Court should therefore overrule *Roe v. Wade*, 410 U.S. 113 (1973), and set this case for further briefing and reargument on the issue of the proper disposition of this appeal.

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APRIL 6, 1992

APPENDIX
PROCLAMATION 5761 — NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988
January 14, 1988
By the President of the United States of America

A PROCLAMATION

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in *Roe v. Wade*, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the

unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality — that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give

thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

In Witness Whereof, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteenth hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

RONALD REAGAN

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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Nos. 91-744, 91-902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS IN NO. 91-744, AND PETITIONERS IN NO. 91-902

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INTEREST OF THE AMICI *

Amici Curiae are a bipartisan group of more than 600 senators and representatives—men and women—from all fifty States. *Amici* also include the Governor of the Territory of Guam, the Honorable Joseph F. Ada, who is a defendant in the challenge to the Guam abortion law now pending in the United States Court of Appeals for the Ninth Circuit, Lt. Gov. Frank F. Blas, and legislators from Guam and Puerto Rico. *Amici* do not all share the same convictions regarding the manner and extent to which abortion should be regulated or prohibited. But all are in agreement that abortion is properly a matter for the legislative, not the judicial, branch of government, and that States have the constitutional authority to protect unborn human life throughout pregnancy. Because of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), that authority can no longer be exercised.

The issue of abortion poses difficult and complex legal, moral, social, medical and political problems which the judiciary is uniquely ill-suited to resolve. From 1787 until 1973, these questions were raised, freely debated and answered in the public forums of the state legislatures, where the will of the people could be expressed through their popularly elected representatives. That debate has been silenced and those forums have been closed for almost twenty years. The voice of the people will not be heard again until *Roe* is overruled and legislative authority over abortion is restored to the States.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The

* The names of the *amici* appear in the appendix to this brief, which is filed with the consent of the parties.

Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.*

In finding that there is a "fundamental right" to choose abortion, the Court in *Roe* reviewed the treatment of abortion in English and American law (410 U.S. at 129, 132-41, 147-52), and came to the following conclusions:

> [A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id. at 140-41.

Amici curiae respectfully submit that these conclusions, central to the Court's decision in *Roe*, are erroneous. The Court's examination of the history of abortion regulation was seriously flawed and failed to take into account the state of medical technology in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American colonies, and the abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the critical factual assumptions on which *Roe* was erected and suggests that English and American law never recognized a right to choose abortion. Accordingly, *Roe v. Wade* should be overruled.[1]

ARGUMENT

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 796-97 (1986) (White, J., dissenting).

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court, without support in the text, structure or history of the Constitution, reached out and struck down the abortion laws of all fifty States. The Court thereby established as a constitutional right what had long been viewed in English and American law as a serious crime—the intentional destruction of unborn human life. Contrary to the Court's reading of English and American legal traditions in *Roe*, there is no historical basis for concluding that the Due Process Clause of the Fourteenth Amendment, or the right of privacy that has been derived therefrom, embraces a right to choose abortion. Since nothing

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[1] The issue of whether *Roe* should be overruled is properly before this Court. The questions certified for review—whether the challenged provisions of the Pennsylvania Abortion Control Act of 1982, as amended, are constitutional—cannot be answered without first determining the appropriate standard of review applicable to the regulation of abortion. The selection of that standard directly implicates *Roe*. *See Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 532-33 (1989) (Scalia, J., concurring in part and concurring in the judgment).

in the Constitution was intended to deprive the people of their rightful authority, acting through their state legislatures, to protect human life by restricting abortion, that authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has recognized that certain fundamental rights are protected by the Due Process Clause of the Fourteenth Amendment. Due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), and *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923).

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles of constitutional analysis in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Id.* at 191. Some of these cases recognized "rights that have little or no textual support in the constitutional language." *Id.* To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the

nature of the rights qualifying for heightened judicial protection." *Id.*

Thus, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (opinion of Powell, J.). In *Roe*, this Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." 410 U.S. at 152.

In rejecting the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in *Bowers* noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." 478 U.S. at 192. The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Id.* at 192-93. Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 193-94. In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U.S. at 194.[2]

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[2] The Court has continued to rely upon historical traditions in evaluating asserted claims of constitutional right not based upon an explicit constitutional text. *See, e.g., Michael H. v. Gerald D.*, 491

In *Bowers*, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95.

When these principles are applied to the issue of abortion, it becomes clear that *Roe* was wrongly decided. Contrary to the Court's conclusions, there was no right to choose abortion at common law or under the statutes enacted by state legislatures in the nineteenth century. The uniform and consistent condemnation of abortion as a crime in English and American law contradicts the critical historical findings on which *Roe* was based.

Although petitioners attempt to defend the legitimacy of *Roe* on general privacy grounds (Br. at 22-27),[3] their brief is curiously silent regarding the history of abortion

U.S. 110, 122 n.2, 120-29 (1989) (natural father of child conceived in adulterous relationship lacked protected liberty interest in asserting parental rights over the child).

[3] This effort ultimately fails because, as this Court noted in *Roe*, abortion is "inherently different" from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Stanley v. Georgia*, 394 U.S. 557 (1969), *Loving v. Virginia*, 388 U.S. 1 (1967), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were respectively concerned. 410 U.S. at 159. Abortion is different because it involves the intentional destruction of unborn human life.

regulation. Petitioners do not discuss whether abortion was a crime at common law, or when American legislatures enacted statutes prohibiting abortion or how those statutes were interpreted by state reviewing courts. This silence is all the more remarkable given the need to ground an asserted privacy right (in this case, the right to choose abortion) "in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. at 503 (opinion of Powell, J.). Only the "Historians' Brief" in support of petitioners even attempts to remedy these deficiencies. It fails to do so, however, because as both this brief and the brief *amicus curiae* of the American Academy of Medical Ethics demonstrate, it seriously distorts both the common law record and the pattern of nineteenth century legislative activity restricting abortion. Moreover, the "Historians' Brief," in asserting that "emphasis on the fetus became central to cultural and legal debate over abortion only in the late twentieth century," Br. at 26, simply ignores scores of judicial opinions from state courts which recognized that their nineteenth century abortion laws were enacted with the intention of protecting unborn human life.

II. THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES AND STATES, PROHIBITED AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief,[4] the following is offered as a summary.

The thirteenth century commentators Bracton and Fleta classified abortion of a "formed and animated"

[4] The court is referred to the brief *amicus curiae* of the American Academy of Medical Ethics in support of Respondents in No. 91-744, and Petitioners in 91-902, and J. Keown, *Abortion, doctors*

fetus as homicide.[5] The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that, while not "murder", abortion of a woman "quick with childe" was a "great misprision." E. Coke, *Third Institute of the Laws of England* at 50 (1644).[6] If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.*[7] In his classic *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be *"a reasonable creature in being, and under the king's peace,"* at the time of the killing . . . To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On The Laws Of England* 198 (1769) (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone, *Commentaries*, at 126 (1765).

"Quickening" (the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live

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and the law at 3-12 (Cambridge University Press 1988), for a fuller presentation of this history.

[5] 2 H. de Bracton (c. 1250), *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); Fleta (c. 1290), Bk. I, ch. XXIII, "Of Homicide," which appears in Vol. II of the translated works of Fleta, *Publications of the Selden Society*, Vol. 72, pp. 60-61 (1955).

[6] A "misprision," according to Coke, was "a heinous offense under the degree of felony." *Id.* at 139.

[7] Other leading authorities accepted Coke's declaration regarding the criminality of abortion at common law. *See* M. Hale, *Summary of the Pleas of the Crown* 53 (1678); 1 W. Hawkins, *A Treatise of the Pleas of the Crown* 80 (1716); 1 E. East, *A Treatise on the Pleas of the Crown* 227-30 (1803); 1 Wm. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819).

human being in the womb, and whether the abortion had caused the child's death. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L.Rev. 807, 815-16 (1973). This test "was never intended as a judgment that before quickening the child was not a live human being." *Id.* at 816.[8]

The views of Coke and Blackstone were accepted by American courts in the nineteenth century as accurate statements of the criminality of abortion at common law. *See, e.g., Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); *State v. Cooper*, 22 N.J.L. 52, 53-58 (1849). In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[9] The courts of at least three States went

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[8] In *R. v. Bourne*, 1 K.B. 687 (1939), Judge Macnaghten observed that "long before then [the enactment of the first English abortion statute in 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime . . . . The protection which the common law afforded to human life extended to the unborn child in the womb of its mother." *Id.* at 690. English cases recognizing the criminality of abortion at common law are collected in the Brief *Amicus Curiae* of the American Academy of Medical Ethics.

[9] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (*dictum* in case decided under statute abolishing quickening distinction); *Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856) (*dictum* in slander case); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Smith v. State*, 33 Me. 48, 55 (1851) (*dictum* in case decided under statute abolishing quickening distinction); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child"); *State v. Emerich*, 13 Mo. App. 492, 495-98 (1883) (*dictum* in case decided under statute), *aff'd*, 87 Mo. 110 (1885); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging

further, holding that abortion at any stage of pregnancy was a common law crime. *State v. Reed*, 45 Ark. 333, 334 (1885); *State v. Slagle*, 82 N.C. 630, 632 ((1880); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850). The Maryland Court of Appeals may have had these cases in mind when it reported widespread judicial abandonment of the medically obsolete quickening distinction:

> [A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that *abortion is a crime at common law without regard to the stage of pregnancy.*

Lamb v. State, 67 Md. 524, 533, 10 A. 208 (1887) (emphasis supplied). *See also Marmaduke v. People*, 45 Colo. 357, 361-62, 101 P. 337, 338 (1909).[10]

These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in *Roe* that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. 113, 136 (1973). No American court ever held that abortion after quickening was not a criminal offense.

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defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute); *Arnold v. Gaylord*, 16 R.I. 573, 576, 18 A. 177, 178-79 (1889) (*dictum* in loss of services case).

[10] Leading nineteenth-century commentators were in accord. *See Bishop on Statutory Crimes* (2d ed.), § 744, p. 447 (1883); F. Wharton, *American Criminal Law* (6th rev. ed.), §§ 1220-30, pp. 210-18 (1868) (criticizing quickening distinction and concluding that abortion was a crime at common law, regardless of the stage of pregnancy). *See R. v. Wycherly*, 8 Car. & P. 262, 173 Eng. Rep. 486 (N.P. 1838). Bishop and Wharton were "the two most frequently cited American writers" on substantive criminal law. Wm. Burdick, *Law of Crime*, Foreword at v (1946).

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." J. Spruill, *Women's Life and Work in the Southern Colonies* at 325-26 (1938). Another historian, Lyle Koehler, records the Rhode Island case of Deborah Allen, who was convicted and punished in 1683 for fornication and "Indeavoringe the dithuchion [destruction] of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329 & n. 132 (1980).

Admittedly, there are few reported abortion prosecutions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," (C. Scholten, *Childbearing In American Society 1650-1850* at 9 (1985)), and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. J. Mohr, *Abortion in America* at 72 (1978). Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was a common law crime in the United States. *Id.* at 3. The decision to choose abortion was not a right at common law, in England or America. Abortion was a crime and was punished accordingly.

III. THE NINETEENTH CENTURY ABORTION STATUTES, WHICH ABOLISHED THE COMMON LAW QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE.

The Court's assertions in *Roe* that "the pre-existing English common law" of abortion remained in effect in

this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law" are simply wrong. 410 U.S. at 138-139. By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion,[11] and by the

[11] *See, generally,* Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment,* 17 St. Mary's L.J. 29, 32 *et seq.* (1985) (hereinafter *Witherspoon*). The following eighteen States adopted abortion statutes before 1850: *Alabama,* Ala. Pen. Code, ch. VI, § 2, p. 238 (Meek Supp. 1841), as amended, Ala. Code, § 3605, p. 690 (1866-67); *Arkansas,* Ark. Rev. Stat., ch. 44, div. III, art. II, § 6 (1838); *Connecticut,* Conn. Pub. Stat., tit. 22, § 14, p. 152 (1821), replaced by Conn. Pub. Acts, ch. LXXI, §§ 1-4, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866), which made abortion at any stage of pregnancy a crime; *Illinois,* Act of Jan. 30, 1827, § 46, Ill. Rev. Laws, p. 131 (1827), repealed and replaced by an Act of Feb. 26, 1833, § 46, Ill. Rev. Laws, p. 179 (1833), which was replaced by an Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana,* Act of Feb. 7, 1835, ch. XLVII, § 3, Ind. Gen. Laws, p. 66 (1835), codified at Ind. Rev. Stat. ch. XXVI, p. 224 (1838), superseded by Ind. Gen. Laws, ch. LXXXI, § 2, pp. 130-31 (1859); *Iowa* (admitted to statehood Dec. 28, 1846), Act of Jan. 25, 1839, § 18, Iowa (Terr.) Stat., 1st Legis., 1st Sess., p. 145 (1838), superseded by an Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860), which made abortion at any stage of pregnancy a crime (an Act of Feb. 16, 1843, penalized the intentional destruction of an unborn quick child as manslaughter, Iowa (Terr.) Rev. Stat., ch. 49, § 10, p. 167 (1843)); *Maine,* Me. Rev. Stat., ch. 160, §§ 13-14, p. 686 (1840), recodified, as amended, at Me. Rev. Stat., tit. 11, ch. 124, § 8, p. 685 (1857); *Massachusetts,* Mass. Acts & Resolves, ch. 27, p. 406 (1845), subsequently codified, as amended, at Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Michigan,* Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Mississippi,* Act of Feb. 15, 1839, tit. III, art. 1, § 9, Miss. Laws, p. 113 (1839), codified at Miss. Code, ch. LXIV, tit. III, § 9, p. 958 (1848), recodified at Miss. Rev. Code, ch. LXIV, art. 173, p. 601 (1857); *Missouri,* Mo. Rev. Stat., art. II, §§ 10, 36, pp. 168-69, 172 (1835), recodified, as amended, at Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, §§ 10, 34, pp. 778-79, 781 (1866); *New Hampshire,* Act of Jan. 4, 1849, N.H. Laws, ch. 743, §§ 1-4, pp. 708-09 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New Jersey,* Act of Mar. 1, 1849, N.J. Laws, pp. 266-27 (1849); *New York,* Act of Dec. 10, 1828,

end of the Civil War, twenty-seven of the thirty-six States had done so.[12] By the end of 1868, the year in

ch. 20, 4, N.Y. Laws, 51st Legis., 2nd Sess., p. 19 (1828), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 661, and tit. VI, § 21, p. 694 (1828-29), as amended by an Act of Apr. 30, 1830, ch. 320, § 58, N.Y. Laws, p. 401 (1830), corified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, pp. 550-51, and pt. IV, ch. I, tit. VI, § 21, pp. 578-79 (1828-35), repealed and replaced by N.Y. Laws, ch. 260, §§ 1-3, 6, pp. 285-86 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, §§ 20-21, p. 779 (1846), and N.Y. Laws, ch. 22, § 1, p. 19 (1846), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 750 (1846); *Ohio,* Act. of Feb. 27, 1834, §§ 1, 2, Ohio Laws, pp. 20-21 (1834), codified at Ohio Gen. Stat., ch. 35, §§ 111, 112, p. 252 (1841), as amended by an Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867), which made the death of the woman or of her unborn child at any stage of pregnancy a "high misdemeanor"; *Vermont,* Vt. Acts, No. 33, § 1, pp. 34-35 (1846), codified at Vt. Comp. Stat., tit. XXVIII, ch. 108, § 8, pp. 560-61 (1839-1850), as amended by an Act of Nov. 21, 1867, Vt. Acts, No. 57, §§ 1, 3, pp. 64-66 (1867); *Virginia,* Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *Wisconsin,* Wis. Rev. Stat., pt. IV, tit. XXX, ch. 133, § 11, pp. 683-84 (1849), superseded by Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[12] In addition to the eighteen States listed in note 11, the following nine States adopted abortion statutes between 1850 and 1865: *California* (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, § 45, p. 233 (1849-1850), as amended by an Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Kansas* (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, §§ 10, 39, pp. 238, 243 (1855), superseded by Kan. (Terr.) Laws, ch. XXVIII, §§ 10, 37, pp. 232, 237 (Acts of 1859), codified at Kan. Comp. Laws, ch. XXXIII, §§ 10, 37, pp. 288, 293 (1862); *Louisiana,* La. Acts, Act. 120, § 24, pp. 132-33 (1855), codified at La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Minnesota* (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, § 11, p. 493 (1851); *Nevada* (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *Oregon* (admitted to statehood Feb. 14, 1859), Act of Dec. 22, 1853, ch. III, § 13, Or. (Terr.) Stat., p. 187 (1853-54), superseded by an Act of Oct. 19, 1864, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *Pennsylvania,* Pa. Laws, No. 374, tit. VI, §§ 87, 88, pp. 404-05 (1860); *Texas,* Act of Feb. 9, 1854, § 1, Tex. Gen. Laws, ch. XLIX,

which the Fourteenth Amendment was ratified, thirty of the then thirty-seven States had enacted such statutes, including twenty-five of the thirty ratifying States,[13] together with six of the ten federal territories.[14]

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§ 1, p. 58 (1854), superseded by an Act of Aug. 28, 1856, codified at Tex. Pen. Code of 1857, arts. 531-36, pp. 103-04, as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), codified at Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1859); *West Virginia* (admitted to statehood June 20, 1863), *see* Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), and W. Va. Const., art. XI, ¶ 8 (1863).

[13] In addition to the twenty-seven States listed in notes 11 and 12, the following three States adopted abortion statutes beween 1865 and 1868: *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, and sub. ch. VIII, § 9 (1868), pp. 64, 97 (1868); *Maryland*, Act of Mar. 20, 1867, Md. Laws, ch. 185, § 11, pp. 342-43 (1867), repealed and re-enacted by an Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Nebraska* (admitted to statehood Mar. 1, 1867), Act of Feb. 12, 1866, Neb. (Terr.) Stat., pt. III, ch. IV, § 42, pp. 598-99 (1866-67). Of the thirty States ratifying the Fourteenth Amendment as of July 21, 1868, all but Georgia (1876), North Carolina (1881), Rhode Island (1896), South Carolina (1883) and Tennessee (1883) had enacted such statutes.

[14] The following territories adopted statutes restricting abortion by the end of 1868: *Arizona*, Ariz. (Terr.) Code, ch. X, div. 5, § 45, p. 54 (1865); *Colorado*, Colo. (Terr.) Laws, div. 4, § 42, pp. 296-97 (1861); Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Idaho*, Act of Feb. 4, 1864, ch. IV, § 42, Idaho (Terr.) Laws, p. 443 (1863-64), repealed and re-enacted by an Act of Dec. 21, 1864, ch. III, pt. IV, § 42, Idaho (Terr.) Laws, p. 305 (1864); *Montana*, Mont. (Terr.) Laws, Criminal Practice Acts, ch. IV, § 41, p. 184 (1864); *New Mexico*, N.M. (Terr.) Laws, No. 28, ch. 3, § 11, p. 88 (1854), codified at N.M. Rev. Stat., art. XXIII, ch. LI, § 11, p. 320 (1865); *Washington*, Wash. (Terr.) Stat., ch. II, §§ 37, 38, p. 81 (1854).

These enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, § III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No territorial abortion statute was ever

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As Justice Rehnquist observed in dissent, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting). After reciting the statutory history set out above, Justice Rehnquist stated:

> There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Id. at 177 (Rehnquist, J., dissenting).

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations. *Id.* at 151-52. Three reasons were offered in support of this conclusion, none of which withstands scrutiny.

First, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus." *Id.* at 151 & n.48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misapprehended the holding in the single case cited for

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nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment.

this proposition,[15] but also overlooked twenty-five decisions from sixteen jurisdictions expressly affirming that their nineteenth century statutes were intended to protect unborn human life,[16] and twenty-six other decisions from seventeen additional jurisdictions strongly implying the

[15] The Court's reading of *Murphy* appears to be at odds with the New Jersey Supreme Court's understanding of its earlier opinion. *See State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956), and *Gleitman v. Cosgrove*, 49 N.J. 22, 41, 227 A.2d 689, 699 (1967) (Francis, J., concurring).

[16] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Hall v. People*, 119 Colo. 141, 143, 201 P.2d 382, 383 (1948) ("offense described by the statute . . . is the criminal act of destroying the fetus at any time before birth"); *Dougherty v. The People*, 1 Colo. 514, 522-23 (1872); *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Alcorn*, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); *Joy v. Brown*, 173 Kan. 833, 839-40, 252 P.2d 889, 892 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913) (statute "carries the facial evidence of the legislative intent to cover the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child"); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *Rosen v. Louisiana Board of Medical Examiners*, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court), *vacated and remanded*, 412 U.S. 902 (1973) (interpreting Louisiana law); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State v. Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *People v. Lovell*, 40 Misc. 2d 458, 459, 242 N.Y.S.2d 958, 959 (1963); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Powell*, 181 N.C. 515, 106 S.E. 133 (1921); *but see State v. Jordon*, 227 N.C. 579, 580, 42 S.E.2d 674 (1947) (*contra* regarding pre-quickening abortion); *State v. Tippie*, 89 Ohio Stat. 35, 39-40, 105 N.E. 75, 77 (1913); *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *State v. Ausplund*, 86 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Farnam*, 82 Or. 211, 217, 161 P. 417, 419 (1916) (pregnant woman could not lawfully consent to the homicide of her unborn child); *State v. Atwood*, 54 Or. 526, 531, 102 P. 295, 297 (1909), *aff'd on reh.*, 54 Or. 526, 104 P. 195 (1909); *State v. Steadman*, 214 S.C. 1, 7-8, 51 S.E.2d 91, 93 (1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). *See also People v. Belous*, 71 Cal. 2d 954, 978, 458 P.2d 194, 209, 80 Cal. Rptr. 354, 369 (1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child").

same.[17] In every decade since the 1850's, there has been

[17] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955); *State v. Magnell*, 19 Del. (3 Penne.) 307, 308, 51 A. 606 (1901); *Urga v. State*, 155 Fla. 86, 90, 20 So.2d 685, 687 (1944) (approving jury instruction that "[t]he gist of the statutory offense is the intent to terminate the creation by nature of a child and the intent to bring about the miscarriage of a woman"); *Weightnovel v. State*, 46 Fla. 1, 7-8, 35 So. 856, 858-59 (1903); *but see Walsingham v. State*, 250 So.2d 857, 861 (Fla. 1971) ("[p]rotection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the abortion statutes in 1868"); *Territory v. Young*, 37 Haw. 150, 159-60 (1945), *appeal dismissed*, 160 F.2d 289 (9th Cir. 1947); *Earll v. People*, 99 Ill. 123, 132 (1881) (abortion "a grave crime, involving the destruction of an unborn child"); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1866); *Abrams v. Foshee*, 3 Iowa 273, 278 (1856); *State v. Rudman*, 126 Me. 177, 180, 136 A. 817, 819 (1927) (abortion law intended "to be an express and absolute prohibition" of "the destruction of unborn life for reasons . . . other than necessity to save the mother's life"); *Smith v. State*, 33 Me. 48, 57-59 (1851); *Worthington v. State*, 92 Md. 222, 237-238, 48 A. 355, 356-57 (1901); *Lamb v. State*, 67 Md. 524, 532-33, 10 A. 208 (1887); *People v. Sessions*, 58 Mich. 594, 595-96, 26 N.W. 291, 293 (1886); *People v. Olmstead*, 30 Mich. 431, 432-33 (1874); *but see People v. Nixon*, 42 Mich. App. 332, 335-40, 201 N.W.2d 635, 639-41 (1972), *on remand*, 50 Mich. App. 39, 212 N.W.2d 607 (1973) (*contra* regarding pre-quickening abortion); *Smith v. State*, 112 Miss. 802, 810, 73 So. 793, 794 (1916), *overruled on other grounds*, *Ladnier v. State*, 155 Miss. 348, 124 So. 432 (1929); *Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389 (1946), *on rehearing*, 147 Neb. 73, 25 N.W.2d 35 (1946); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *but see State v. Millette*, 112 N.H. 458, 464, 299 A.2d 150, 154 (1972) ("[e]arly proscription of the practice of abortion primarily sought to protect pregnant women from risks present in all surgical procedures at that time"); *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921); *Railing v. Commonwealth*, 110 Pa.St. 100, 104, 1 A. 314, 315 (1885); *Commonwealth v. W.*, 3 Pittbs. R. 462, 470-71 (1871) (charge to jury that abortion is "a crime against nature, closely allied to murder, and . . . deserving of severe and ignominious punishment"); *Sylvia v. Gobeille*, 101 R.I. 76, 77-78, 220 A.2d 222, 223 (1966); *State v. Crook*, 16 Utah 212,

at least one American state court decision recognizing this purpose.

In 1851, the Supreme Court of Maine explained that under its 1840 abortion statute, which abolished the common law quickening distinction, "the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not." *Smith v. State*, 33 Me. 48, 57 (1851). In 1859, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the State's 1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1868, the Supreme Court of Iowa, affirming the defendant's conviction of murder for causing the death of a woman by an illegal abortion under an 1858 statute, condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *State v. Moore*, 25 Iowa 128, 136 (1868). In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. The People*, 1 Colo. 514, 522 (1872).

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended

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216-17, 51 P. 1091, 1093 (1898); *Doe v. Rampton*, No. C-234-70, Slip. Op. at 7-8 (D. Utah 1971) (three-judge court), *vacated and remanded*, 410 U.S. 950 (1973) (interpreting Utah law); *Hatchard v. State*, 79 Wis. 357, 360, 48 N.W. 380, 381 (1891); *State v. Dickinson*, 41 Wis. 299, 309 (1877); *but see Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923) (*contra* regarding pre-quickening abortion but acknowledging that "[i]n a strictly scientific and physiological sense there is life in an embryo from the time of conception"). *See also Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), where the District of Columbia Court of Appeals observed that "abortion is generally regarded as heinous in character," and held that "[t]he performance of an abortion for any of these reasons [*i.e.*, to avoid social disgrace or poverty or illegitimacy] is . . . offensive to our moral conception . . . ." *Id.* at 83.

in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881). In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 16 Utah 212, 217, 51 P. 1091, 1093 (1898).

In 1901, the Maryland Court of Appeals explained that American abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer.

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901). The court characterized abortion as an "abhorrent crime," which "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child." *Id.* at 38, 48 A. at 357.

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its abortion statute, first adopted in 1841, was "to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ."

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916). Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'" *Id.* at 488, 73 So. at 836.

In a case decided in 1917, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

State v. Ausplund, 86 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917).

In 1921, the New Mexico Supreme Court described the offense of abortion under its statute, first enacted as a territorial law in 1854 and later codified in 1915, as "the *murder* of a quick child, still in its womb, accomplished by means of the use of drugs or instruments upon the

mother." *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921) (emphasis supplied).[18]

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1864, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society." *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936).

In 1942, the Supreme Court of Georgia declared that in enacting its abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942). In 1949, the Virginia Supreme Court of Appeals stated that its abortion statute—enacted in 1848 and codified in 1849—"was passed, not for the protection of the woman, but for the protection of the unborn child . . . ." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949).

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953). Rejecting defendant's argument that the decedent's consent to an illegal act barred recovery, the court said, "[w]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892.

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[18] Seventeen States and the District of Columbia had statutes denominating acts causing the death of an unborn child (an abortion or other criminal act) as "manslaughter," "murder," or "assault with intent to murder." The statutes are collected in *Witherspoon*, 17 St.Mary's L.J. at 44 & n. 47.

In 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960). And in 1963, a New York court observed that the State's abortion legislation was "designed to protect the natural right of unborn children to life." *People v. Lovell*, 40 Misc. 458, 459, 242 N.Y.S.2d 958, 959 (1963).

State court decisions affirming the protection of unborn human life as one purpose of their abortion statutes continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe* was decided, six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.[19]

In sum, at least fifty-seven decisions from thirty-nine States recognized that their nineteenth century abortion statutes were enacted with an intent to protect unborn human life. Given this wealth of case authority, dating back more than 120 years before *Roe v. Wade* was decided, the Court's conclusion in *Roe* that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" is insupportable.

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to promote maternal health and not to protect prenatal life, the Court in *Roe* observed that "[i]n

[19] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 144, 505 P.2d 580, 582 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E. 2d 265, 267-70 (1972); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 901-03 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *State v. Munson*, 86 S.D. 663, 667-72, 201 N.W.2d 123, 125-26 (1972); *vacated and remanded*, 410 U.S. 950 (1973); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

many States . . . by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. The Court, however, failed to note that at least nineteen States enacted statutes which expressly incriminated the woman's participation in her own abortion.[20] Although no prosecutions were reported under any of these statutes, their enact-

[20] *Arizona*, Ariz. Pen. Code, § 455, p. 711 (1887), repealed and re-enacted, Ariz. Pen. Code, § 244, p. 1228 (1901); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); Act of Feb. 14, 1872, codified at Cal. Pen. Code, § 275, p. 69 (1872); *Connecticut*, Conn. Pub. Acts, ch. LXXI, § 3, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, § 24, p. 249 (1886); *Delaware*, Act of July 6 1972, § 1, Del. Laws, ch. 497, pp. 1611, 1664 (1972), Del. Code Ann., tit. 11, § 652 (1974 Rev.); *Idaho*, Idaho Rev. Stat., § 6795 (1887); *Indiana*, Ind. Laws, ch. XXXVII, § 23, p. 177 (1881), codified at Ind. Rev. Stat., § 1924, p. 358 (1881); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, § 3, p. 118 (1873); codified at Minn. Gen. Stat., ch. 94, § 18, p. 885 (1878), recodified at Minn. Gen. Stat., § 6546, p. 1751 (1894); *Montana*, Mont. Pen. Code, § 481 (1895), re-enacted and recodified at Mont. Rev. Code, § 94-402 (1947); *Nevada*, Act of Feb. 16, 1869, ch. XXII, § 1, Nev. Laws, pp. 64-65 (1869), superseded by an Act of Mar. 17, 1911, ch. 13, § 140 (Senate Bill 124, p. 43), codified at Nev. R.L. § 6405, p. 1836 (1912), recodified at Nev. Rev. Stat., § 200.220 (1963); *New Hampshire*, Act of Jan. 4, 1849, N.H. Laws, ch. 743, § 4, p. 709 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New York*, N.Y. Laws, ch. 260, § 3, p. 286 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21, p. 779 (1846), superseded by N.Y. Laws, ch. 181, § 2, p. 509 (1872), codified at N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, sec. 10, p. 933 (1875); *North Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at N.D. Rev. Codes, § 7178, p. 1272 (1895); *Oklahoma*, Okla. Stat., § 2188 (1890), codified at Okla. Rev. Laws, § 2437, p. 604 (1910); *South Carolina*, Act of Dec. 24, 1883, No. 354, § 3, S.C. Acts, p. 548 (1883), codified at S.C. Rev. Stat., Crim. Stat., § 138, p. 310 (1893); *South Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at S.D. Ann. Stat., § 7798, p. 1919 (1899); *Utah*, Utah. Rev. Stat., § 4227, p. 903 (1898), recodified at Utah Code Ann., § 76-2-2 (1953); *Washington*, Wash. Laws, ch. 249, § 197, p. 948 (1909), codified at Rev. Code Wash., § 9.02.020 (1961); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIX, § 59, p. 969 (1858); *Wyoming*, Wyo. Laws, ch. 73, § 32, p. 131 (1890), codified as Wyo. Stat., § 6-78 (1957).

ment certainly casts doubt on the conclusion that women possessed a legal "right" to choose abortion, or that safeguarding maternal health was the sole intention of the lawmakers.

The majority of States did not criminalize the conduct of a woman who attempted to abort herself or who submitted to an abortion performed upon her by another. Women were exempt from criminal prosecution in these States, not because protection of women was the sole purpose of these laws, but for other reasons.

Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 82 Or. 211, 217, 161 P. 417, 419 (1916). The woman was seen as a second victim of the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, conviction of the abortionist often depended upon the testimony of the woman who underwent the abortion. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. And in most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for reasons of both principle and practicality, the woman who underwent an abortion was considered a victim of the offense.[21]

Finally, the Court stated that "[most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. From this premise, the Court drew the conclusion that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. The Court's premise, as well as its conclusion, was flawed.

[21] *See, Annot., Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testmony*, 34 A.L.R.3d 858 (1970).

As of late 1868, thirty of the then thirty-seven States had enacted statutes restricting statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortion at any stage of pregnancy. Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortion equally, regardless of the stage of pregnancy.[22] By the end of 1883, twenty-seven of the thirty-six States that had enacted abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[23]

[22] The statutes are set forth in notes 11-13, *supra*.

[23] *Alabama*, Ala. Code, § 3605, p. 690 (1866-67); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Colorado*, Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Connecticut*, Conu. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866); *Delaware*, Act of Feb. 13, 1883, ch. 226, §§ 1, 2, Del. Laws, p. 522 (1883), codified at Del. Rev. Stat., p. 930 (1893); *Georgia*, Act of Feb. 25, 1876, ch. CXXX, §§ II, III, Ga. Laws, p. 113 (1876), codified at Ga. Code, § 4337 (a)-(c), p. 1143 (1882); *Illinois*, Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana*, Ind. Gen. Laws, ch. LXXXI, pp. 130-31 (1859); *Iowa*, Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860); *Louisiana*, La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Maine*, Me. Rev. Stat., tit. 11, ch. 124, § 8, 685 (1857); *Maryland*, Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Massachusetts*, Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, §§ 1-3, pp. 117-18 (1873), codified at Minn. Gen. Stat., ch. 94, §§ 16-18, pp. 884-85 (1878); *Nebraska*, Neb. (Terr.), Stat., pt. III, ch. IV, 42, pp. 598-99 (1866-67); *Nevada*, Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *New Jersey*, Act of Mar. 1, 1849, N.J. Laws, pp. 266-67 (1849); *North Carolina*, Act of Mar. 12, 1881, ch. 351, N.C. Laws, pp. 584-85 (1881), codified at N.C. Code, §§ 975, 976, p. 399 (1883); *Ohio*, Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867); *Oregon*, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *South Carolina*, Act of Dec, 24, 1883, No. 354, §§ 1-3, S.C. Acts, pp. 547-48 (1883), codified at S.C. Rev. Stat., Crim. Law, §§ 122, 137, 138, pp. 305, 309-10 (1893); *Tennessee*, Act of Mar. 26, 1883, ch. CXL,

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." *Witherspoon*, 17 St. Mary's L.J. at 36 (1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child.[24] As Witherspoon has observed, "[i]f the

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Tenn. Acts, pp. 188-89 (1883), codified at Tenn. Code, §§ 5371, 5372, p. 1031 (Milliken & Vertee's 1884); *Texas*, Tex. Pen. Code, arts. 531-36, pp. 103-04 (1857), as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), corifigd at Tex. Gen. Stat. Dig., ch. VII, arts. 531-36, p. 524 (Oldham & White 1859); *Vermont*, Act of Nov. 21, 1867, Vt. Acts, No. 57, § 1, pp. 64-65 (1867); *Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *West Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), corified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), W. Va. Const., art. XI ¶ 8 (1863); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[24] In addition to the statutes from Georgia, Maine, Minnesota, Ohio, Oregon, South Carolina, Tennessee and Wisconsin listed in n.23 may be added the following: *Arkansas*, Ark. Rev. Stat. ch. 44, div. III, art. 2, § 6 (1838); Act of Nov. 8, 1875, § 1, Ark. Acts., No. IV, p. 5 (1875); *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, sub. ch. VIII, § 9, pp. 64, 97 (1868); *Indiana*, Ind. Rev. Stat. § 1923, p. 358 (1881); *Michigan*, Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Missouri* Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, § 10, 34 pp. 778-79, 781 (1866); *Nebraska*, Neb. Gen. Stat., ch. 58, §§ 6, 39, pp. 720, 727-28 (1873); *New Jersey*, Act of Mar. 25, 1881, N.J. Laws, ch. CXCI, p. 240 (1881); *New York*, Act of July 26, 1881, N.Y. Laws, ch. 676 (N.Y. Pen. Code), §§ 191, 194, 294, 295, pp. 45-46, 72-73 (1881), 3 N.Y. Rev. Stat. at 2478-80 (1881); *Pennsylvania*, Pa. Laws, No. 374, tit. VI, §§ 87, 88, p. 404-05 (1860); *Texas*, Tex. Pen. Code, arts. § 531, 535, pp. 103-04 (1857); *Virginia*, Act of Mar. 14, 1878, Va. Acts, ch. 311, (sub.) ch. II, § 8, pp. 281-82 (1878), codified at Va. Code, § 3670, p. 879 (1887); *West Virginia*, W. Va. Acts, ch. CXVIII, § 8, p. 335 (1882), codified at W. Va. Code ch. CXLIV, § 3,

state . . . statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus." *Id.* at 36. "The only explanation of this element of these statues," he concludes, "is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion *before* quickening may not have been criminal at common law. And some of the early American abortion statutes did distinguish between pre- and post-quickening abortions. But this distinction simply reflected the lack of scientific knowledge regarding the nature of human reproduction, and cannot be regarded as a repudiation of the theory that life begins at conception or an implicit acknowledgment that abortion statutes were enacted *solely* to safeguard women from dangerous surgical procedures:

> Only in the second quarter of the nineteenth century did biological research advance to the point of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible.[25]

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p. 677 (1890). Of these States, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

[25] *The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the*

As this Court noted in *Roe*, at 141-42, the newly-formed American Medical Association relied upon this greater understanding of human development in promoting legislation extending the protection of the law to all unborn children.

The foregoing review of the nineteenth century abortion statutes and the scores of cases interpreting them leads to one inescapable conclusion: they were enacted with an intent to protect unborn human life.

IV. IN VIEW OF THE LONG-STANDING CONDEMNATION OF ABORTION IN ENGLISH AND AMERICAN COMMON LAW, AND THE OVERWHELMING EVIDENCE THAT NINETEENTH CENTURY ABORTION STATUTES WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE, THERE IS NO HISTORICAL BASIS FOR CONCLUDING THAT EITHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE RIGHT OF PRIVACY WHICH HAS BEEN DERIVED THEREFROM ENCOMPASSES A FUNDAMENTAL RIGHT TO CHOOSE ABORTION.

The decision to choose abortion cannot be regarded as a fundamental right unless it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade*, was decided.[26] Justice Rehnquist noted the

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Judiciary, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law, Northwestern University). *See also* Dellapenna, *The History of Abortion: Technology, Mortality, and Law*, 40 U. Pitt. L. Rev. 359, 402-04 (1979).

[26] Although, prior to *Roe*, thirteen States had relaxed their restrictions on abortion and had adopted some version of § 230.3 of the Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n. 37) and four other States allowed abortion on demand for part of the gestational period, a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 158-61, 255-59 (Winter 1990). And no State allowed unrestricted abortion throughout pregnancy, which the Court, because of its expansive definition of "health" in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), effectively mandated for every State. *See, e.g., Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980), and *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983), striking down statutes intended to limit post-viability abortions. In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in *dicta* that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Doe v. Bolton*, 410 U.S. 179, 192 (1973). *Id.* at 298-99.

significance of this consistent and widespread condemnation of abortion in his dissent in *Roe*:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranged as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

410 U.S. at 174 (Rehnquist, J., dissenting.).

Abortion is not mentioned in the Constitution and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment thought that they were incorporating a right to choose abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick* and *Michael H. v. Gerald D.*, the decision to choose abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and legislative authority over abortion should be returned to the States.[27]

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[27] Although the overruling of *Roe* would allow States to regulate or prohibit abortion, it would not restore the *status quo ante* of January 22, 1973. Thirty States have expressly repealed their pre-*Roe* laws, and several others may have repealed them by implication. None of these laws would be revived by an overruling decision. New laws would have to be enacted, as they have been

CONCLUSION

For the foregoing reasons, the judgment in No. 91-744 should be affirmed, and the judgment in No. 91-902 should be reversed.

Respectfully submitted,

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April 6, 1992

APPENDIX

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in Louisiana and Utah. Moreover, many of the unrepealed pre-*Roe* laws allow abortion on demand throughout at least some stage of pregnancy (Alaska, Hawaii, New York) or under a very broad range of circumstances, including mental health (California, Colorado, Delaware, Kansas, Massachusetts (by judicial decision) and New Mexico). Furthermore, several States have recognized a right to abortion (or public funding) on state constitutional grounds. *See, e.g., Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Moe v. Secretary of Admin. and Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Beecham v. Leahy*, 130 Vt. 164, 287 A.2d 836 (1972). Thus, the immediate impact of an overruling decision upon abortion practice in the overwhelming majority of the States would be modest and readily ascertainable. *See* Linton, *Enforcement of State Abortion Statutes after Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157 (1990).

APPENDIX

List of Amici

(More than 600 legislators from all fifty States, the Commonwealth of Puerto Rico and the Territory of Guam)

Alabama

Sen. Jim Preuitt (D)	11th District
Sen. John E. Amari (R)	15th District
Rep. Ronald G. Johnson (D)	33rd District
Rep. Gerald Willis (D)	34th District
Rep. Bobby C. Crow (D)	35th District
Rep. Bob McKee (R)	74th District
Rep. Claud L. Walker (D)	75th District

Alaska

Lt. Gov. J.B. Jack Coghill (I)	
Rep. Loren Leman (R)	9th District
Rep. Terry H. Martin (R)	13th District
Rep. John C. Gonzalez (R)	17th District
Rep. Michael W. Miller (R)	18th District

Arizona

Sen. Jim Buster (R)	5th District
Sen. Matt Salmon (R)	21st District
Sen. Manuel Pena, Jr. (D)	22nd District
Sen. Lester N. Pearce (R)	29th District
Rep. Ben Benton (R)	2nd District
Rep. Henry Evans (D)	6th District
Rep. Dave McCarroll (R)	16th District
Rep. Karen R. Mills (R)	16th District
Rep. Robert L. Burns (R)	17th District
Rep. Leslie Whiting Johnson (R)	21st District
Rep. Stan Barnes (R)	21st District
Rep. Tom Smith (R)	26th District
Rep. Lela Steffey (R)	29th District
Rep. Pat Blake (R)	29th District

Arkansas

Rep. H. Lacy Landers (D)	47th District
Rep. Keith N. Wood (D)	87th District

California

Sen. Tim Leslie (R)	1st District
Sen. Don Rogers (R)	16th District
Sen. Bill Leonard (R)	25th District
Assemblyman David Knowles (R)	7th District
Assemblyman Phillip D. Wyman (R)	34th District
Assemblyman Paul Woodruff (R)	61st District
Assemblyman Nolan Frizzelle (R)	69th District
Assemblyman David G. Kelley (R)	73rd District
Assemblywoman Carol Bentley (R)	77th District

Colorado

Sen. MaryAnne Tebedo (R)	12th District
Sen. Jim Roberts (R)	15th District

Connecticut

Sen. Stephen R. Somma (R)	16th District

Delaware

Rep. J. Benj. Ewing (R)	35th District

Florida

Rep. Tom Feeney (R)	37th District

Georgia

Rep. B. Joseph Brush, Jr. (R)	83rd District

Hawaii

Sen. Stanley T. Koki (R)	9th District

Idaho

Sen. Claire Wetherell (D)	12th District
Sen. Mark G. Ricks (R)	31st District
Rep. Harold W. Reid (D)	7B District
Rep. Dolores J. Crow (R)	11E District
Rep. Robert E. Schaefer (R)	11A District
Rep. Horace B. Pomeroy (R)	16B District
Rep. Pattie Lois Nafziger (D)	22B District
Rep. John H. Tippets (R)	28B District
Rep. Jo An E. Wood (R)	30B District

Illinois

Sen. Jeremiah Joyce (D)	14th District
Sen. Forest Etheredge (R)	21st District
Sen. Ted Leverenz (D)	26th District
Sen. Richard F. Kelly, Jr. (D)	39th District
Sen. George Ray Hudson (R)	41st District
Rep. John J. McNamara (D)	27th District
Rep. Dan Cronin (R)	40th District
Rep. James R. Stange (R)	44th District
Rep. Terry Parke (R)	49th District
Rep. Donald N. Hensel (R)	50th District
Rep. Bernard Petersen (R)	54th District
Rep. Penny Pullen (R)	55th District
Rep. Tom Walsh (D)	75th District
Rep. Robert P. Regan (R)	80th District
Rep. Thomas J. McCracken (R)	81st District
Rep. Ed Petka (R)	82nd District
Rep. Phil Novak (D)	86th District
Rep. Art Tenhouse (R)	96th District
Rep. Michael Curran (D)	99th District
Rep. Monroe L. Flinn (D)	114th District
Rep. Terry Deering (D)	115th District
Rep. David D. Phelps (D)	118th District

Indiana

Sen. Richard A. Thompson (R)	24th District
Sen. Joseph V. Corcoran (R)	44th District
Rep. Paul J. Hric (D)	1st District
Rep. John S. Matonovich (D)	11th District
Rep. Kent Adams (R)	22nd District
Rep. Robert J. Bischoff (D)	68th District
Rep. David G. Cheatham (D)	69th District
Rep. Donald T. Nelson (R)	86th District

Iowa

Sen. Wilmer Rensink (R)	3rd District
Sen. Richard Vande Hoef (R)	4th District
Sen. Ray Taylor (R)	9th District
Sen. John W. Jensen (R)	11th District
Sen. Allen Borlaug (R)	15th District
Sen. William W. Dieleman (D)	35th District

Iowa—continued

Rep. Brad Banks (R)	5th District
Rep. Merlin E. Bartz (R)	19th District
Rep. Joseph M. Kremer (R)	27th District
Rep. Charles Hurley (R)	28th District
Rep. Phil Tyrrell (R)	53rd District
Rep. Jane Svoboda (D)	75th District
Rep. Teresa A. Garman (R)	87th District

Kansas

Sen. Dan Thiessen (R)	1st District
Sen. Don Sallee (R)	1st District
Sen. Edward F. Reilly, Jr. (R)	3rd District
Sen. Dave Webb (R)	11th District
Sen. Donald L. Montgomery (R)	21st District
Sen. Ross Doyen (R)	23rd District
Sen. Norma L. Daniels (D)	31st District
Sen. Roy Ehrlich (R)	35th District
Rep. Kerry Patrick (R)	28th District
Rep. Darlene Cornfield (R)	90th District
Rep. Melvin Neufeld (R)	115th District
Rep. Gayle Mollenkamp (R)	118th District

Kentucky

Sen. Richard L. Roeding (R)	24th District
Rep. Kenneth F. Harper (R)	63rd District
Rep. Thomas Kerr (D)	64th District
Rep. William Donnermeyer (D)	68th District
Rep. Louis Johnson (D)	13th District

Louisiana

Sen. Armand J. Brinkhaus (D)	26th District
Rep. Sam H. Theriot (D)	47th District
Rep. Warren J. Triche, Jr. (D)	55th District
Rep. John C. Diez (D)	59th District
Rep. E. Bernard Carrier (D)	71st District
Rep. Shirley D. Bowler (R)	78th District
Rep. Charles D. Lancaster, Jr. (R)	80th District
Rep. James J. Donelon (R)	88th District

Maine

Rep. Walter W. Hichens (R)	3rd District
Rep. Judy Paradis (D)	150th District

Maryland

Sen. Thomas P. O'Reilly (D)	22nd District
Sen. John A. Cade (R) Republican Minority Leader	33rd District
Del. John P. Donoghue (D)	2C District
Del. Charles W. Kolodziejski (D)	31st District
Del. John G. Gary (R)	33rd District
Del. Elizabeth S. Smith (R)	33rd District
Del. J. Lowell Stoltzfus (R)	38th District
Del. Gerald J. Curran (D)	43rd District

Massachusetts

Sen. William M. Bulger (D) Senate President	First Suffolk District
Rep. Philip Travis (D)	4th District
Rep. Thomas M. Finneran (D)	13th District
Rep. James Miceli (R)	20th District

Michigan

Sen. Mat Dunaskiss (R)	8th District
Sen. Doug Carl (R)	9th District
Sen. William Faust (D)	12th District
Sen. Jack Welborn (R)	13th District
Sen. Paul Wartner (R)	21st District
Sen. William Van Regenmorter (R)	23rd District
Sen. Gilbert J. DiAello (D)	26th District
Sen. Fred Dillingham (R)	30th District
Sen. Dick Posthumus (R) Senate Majority Leader	31st District
Sen. James A. Barcia (D)	34th District
Sen. Joanne G. Emmons (R)	35th District
Sen. John Pridnia (R)	36th District
Sen. George McManus (R)	37th District
Sen. Don Koivisto (D)	38th District
Rep. Stanley Stopczynski (D)	11th District
Rep. David Jaye (R)	26th District
Rep. Timothy Walberg (R)	40th District

Michigan—continued

Rep. Dale L. Shugars (R)	47th District
Rep. Margaret O'Connor (R)	52nd District
Rep. Paul Hillegonds (R)	54th District
Rep. Nick Ciaramitaro (D)	73rd District
Rep. David Robertson (R)	83rd District
Rep. W. Todd Akin (R)	85th District
Rep. Jack Horton (R)	90th District
Rep. Jim McBryde (R)	99th District

Minnesota

Sen. Florian W. Chmielewski (DFL) President Pro Tem	14th District
Sen. Thomas M. Neuville (R)	25th District
Sen. Gene Waldorf (DFL)	66th District
Rep. Terry Dempsey (R) Minority Leader	23A District

Mississippi

Sen. Travis Little (D)	4th District
Sen. John White (R)	5th District
Sen. Roger Wicker (R)	6th District
Sen. Ronnie Musgrove (D)	10th District
Sen. Robert G. (Bunky) Huggins (D)	14th District
Sen. Robert Monty (D)	23rd District
Sen. F. Michael Gunn (R)	26th District
Sen. Richard G. White (R)	29th District
Sen. Dean Kirby (R)	30th District
Sen. Billy H. Thames (D)	34th District
Sen. Robert H. (Rob) Smith (D)	35th District
Sen. Pat Welch (D)	38th District
Sen. Thomas A. Gollott (D)	50th District
Rep. Harvey Moss (D)	2nd District
Rep. Charles B. (Charlie) Smith (D)	35th District
Rep. Bennett Malone (D)	45th District
Rep. Hugh Ellard (R)	46th District
Rep. George Flaggs, Jr. (D)	55th District
Rep. Jim Ellington (R)	73rd District
Rep. Clifford C. Britt (D)	76th District
Rep. Eric Clark (D)	79th District
Rep. Roy Dabbs (D)	84th District
Rep. Clem M. Nettles (D)	98th District

Mississippi—continued

Rep. Herb Frierson (D)	106th District
Rep. Larry Elliott Watkins (D)	108th District
Rep. Curt Hebert (R)	111th District
Rep. Robert C. (Bob) Short (D)	118th District

Missouri

Sen. Irene Treppler (R)	1st District
Sen. Fred Dyer (R)	2nd District
Sen. John E. Scott (D)	3rd District
Sen. Larry Rohrback (R)	6th District
Sen. Francis E. Flotron (R)	7th District
Sen. Harry Wiggins (D)	10th District
Sen. John D. Schneider (D)	14th District
Sen. Walt Mueller (R)	15th District
Sen. Emory Melton (R)	29th District
Rep. Edward Schellhorn (D)	8th District
Rep. Dale Whiteside (R)	11th District
Rep. Sam D. Leake (D)	14th District
Rep. George P. Dames (D)	17th District
Rep. Joe Ortwerth (R)	18th District
Rep. Ted House (D)	20th District
Rep. Bonnie Sue Cooper (R)	32nd District
Rep. Pat Kelley (R)	48th District
Rep. Jim Barnes (D)	50th District
Rep. Matt O'Neill (D)	66th District
Rep. Ronald C. Auer (D)	68th District
Rep. Laurie B. Donovan (R)	72nd District
Rep. Richard Dorsey (D)	73rd District
Rep. Michael J. Reid (R)	75th District
Rep. David C. Hale (R)	77th District
Rep. Mark Holloway (R)	84th District
Rep. John Hancock (R)	86th District
Rep. William C. Linton (R)	91st District
Rep. David J. Klarich (R)	94th District
Rep. Francis M. Barnes (R)	96th District
Rep. Jonathan S. Selsor (R)	103rd District
Rep. George Engelbach (R)	106th District
Rep. Carl M. Vogel (R)	112th District
Rep. Don Steen (R)	113th District
Rep. Todd Smith (R)	117th District
Rep. Delbert L. Scott (R)	118th District
Rep. David A. Oetting (R)	121st District

Missouri—continued

Rep. Martin "Bubs" Hohulin (R)	124th District
Rep. T. Mark Elliott (R)	126th District
Rep. Gary L. Burton (R)	127th District
Rep. Ollie Amick (D)	160th District

Montana

Sen. John "Ed" Kennedy, Jr. (D)	3rd District
Sen. Betty Bruski-Maus (D)	12th District
Sen. Francis Koehnke (D)	16th District
Sen. Jerry Noble (R)	21st District
Sen. R.J. "Dick" Pinsoneault (R)	27th District
Sen. Lawrence G. Stimatz (D)	35th District
Sen. Lorents Grosfield (R)	41st District
Sen. James H. Burnett (R)	42nd District
Sen. Thomas F. Keating (R)	44th District
Sen. David Rye (R)	47th District
Rep. Harriet Hayne (R)	10th District
Rep. Ray Peck (D)	15th District
Rep. Dorothy A. Cody (D)	20th District
Rep. Don Steppler (D)	21st District
Rep. Tom Zook (R)	25th District
Rep. Thomas N. Lee (R)	49th District
Rep. Steve Benedict (R)	64th District
Rep. Norm Wallin (D)	78th District
Rep. Orval S. Ellison (R)	81st District
Rep. Timothy J. Whalen (D)	93rd District
Rep. Thomas E. Nelson (R)	95th District

Nebraska

Sen. Bernice Labedz (D)	5th District
Sen. John Lindsay (D)	9th District
Sen. Carol McBride Pirsch (R)	10th District
Sen. Merton L. Dierks (D)	40th District

Nevada

Assemblyman Phil Stout (R)	22nd District
Assemblyman Gaylyn J. Spriggs (R)	36th District

New Hampshire

Sen. Roger C. Heath (R)	3rd District
Sen. Thomas P. Colantuono (R) Senate Assistant Majority Whip	14th District
Sen. Eleanor Podles (R)	16th District

New Hampshire—continued

Rep. Harry Accornero (R)	Belknap–10
Rep. Peter J. Zaharchuk, Jr. (R)	Belknap–10
Rep. Robert J. Daly, Jr. (R)	Carroll—3
Rep. John J. Laurent (R)	Cheshire—2
Rep. David O. Dow (R)	Grafton—8
Rep. Niels F. Nielson, Jr. (R)	Grafton—8
Rep. Ralph Shackett (R)	Grafton–10
Rep. David Hultgren (R)	Hillsborough—1
Rep. Karen Carpenter (R)	Hillsborough–10
Rep. David Wheeler (R)	Hillsborough–10
Rep. Finley C. Rothhaus (R)	Hillsborough–13
Rep. Shawn N. Jasper (R)	Hillsborough–19
Rep. Norman B. Lawrence (R)	Hillsborough–20
Rep. Alan B. Greenglass (R)	Hillsborough–22
Rep. Roland J. Lefebvre (D)	Hillsborough–29
Rep. A. Theresa Drabinowicz (D)	Hillsborough–32
Rep. Leo P. Pepino (R)	Hillsborough–37
Rep. Daniel J. Healy (D)	Hillsborough–38
Rep. Francis J. Laughlin (D)	Hillsborough—38
Rep. Robert O. Ouellette (R)	Hillsborough–48
Rep. Richard Barberia (R)	Merrimack—6
Rep. Henry F. Stapleton (R)	Merrimack—6
Rep. Gabriel V. Daneault (D)	Merrimack—8
Rep. Thomas J. Christie (R)	Merrimack—9
Rep. Mary C. Holmes (R)	Merrimack–13
Rep. David Connell (R)	Rockingham—4
Rep. Kathleen M. Hoelzel (R)	Rockingham—6
Rep. Calvin Warburton (R)	Rockingham—6
Rep. David A. Welch (R)	Rockingham–10
Rep. Thaddeus E. Klemarzcyk (R)	Rockingham–13
Rep. Annette M. Cooke (R)	Rockingham–20
Rep. Bernard J. Raynowska (R)	Rockingham–20
Rep. Arthur W. Smith (R)	Rockingham–20
Rep. Donna P. Sytek (R)	Rockingham—20
Rep. Fredrik Peyron (R)	Sullivan—2
Rep. Beverly T. Rodeschin (R)	Sullivan—2
Rep. Irene C. Domini (R)	Sullivan—5

New Jersey

Sen. Bradford S. Smith (R)	7th District
Sen. Randy Corman (R)	19th District

New Jersey—continued

Sen. Thomas F. Cowan (D)	32nd District
Sen. Gerald Cardinale (R)	39th District
Assemblywoman Clare M. Farragher (R)	12th District
Assemblyman Walter J. Kavanaugh (R)	16th District
Assemblyman Tom Dunn (D)	20th District
Assemblyman John E. Rooney (R)	39th District

New Mexico

Rep. Leonard Lee Rawson (R)	37th District

New York

Sen. Owen H. Johnson (R)	4th District
Sen. Frank Padavan (R) Majority Whip	11th District
Sen. Serphin R. Maltese (R & C)	15th District
Sen. Joseph Holland (R & C)	38th District
Sen. Howard C. Nolan, Jr. (D)	42nd District
Assemblyman Robert C. Wertz (R) Assistant Minority Leader	6th District
Assemblyman Thomas F. Barraga (R)	7th District
Assemblyman Denis J. Butler (D)	36th District
Assemblywoman Elizabeth A. Connelly (D)	58th District
Assemblyman Neil W. Kelleher (R)	100th District
Assemblyman Richard J. Conners (D)	104th District

North Carolina

Sen. Robert C. Carpenter (R)	29th District
Rep. Coy C. Privette (R)	34th District
Rep. Theresa H. Esposito (R) Minority Whip	39th District
Rep. Bradford V. Ligon (R)	83rd District

North Dakota

Sen. Ken Solberg (R)	7th District
Sen. Dan Jerome (D-NPL)	9th District
Sen. Dale Marks (D-NPL)	29th District
Sen. Pete Naaden (R)	30th District
Sen. Aaron Krauter (D)	35th District
Sen. Ray David (R)	36th District
Sen. Tim Mathern (D-NPL)	51st District

North Dakota—continued

Rep. Orville Schindler (R)	14th District
Rep. William E. Gorder (R)	16th District
Rep. James Kerzman (D)	35th District
Rep. Francis J. Wald (R)	37th District
Rep. Rich Wardner (R)	37th District
Rep. Audrey Cleary (D)	49th District
Rep. James Boehm (R)	53rd District

Ohio

Sen. Ben Gaeth (R)	1st District
Sen. Robert R. Cupp (R)	12th District
Sen. Dick Shafrath (R)	19th District
Sen. Gary C. Suhadolnik (R)	24th District
Sen. Steven O. Williams (R)	31st District
Rep. Sean D. Logan (D)	3rd District
Rep. Randy Gardner (R)	5th District
Rep. Edward Kasputis (R)	6th District
Rep. Ronald Suster (R)	19th District
Rep. Cheryl Winkler (R)	20th District
Rep. Jerome F. Luebbers (D)	21st District
Rep. Louis W. Blessing, Jr. (R)	22nd District
Rep. Jacquelyn O'Brien (R)	26th District
Rep. Dale Van Vyven (R)	27th District
Rep. Robert E. Hickey (D)	39th District
Rep. Dave Johnson (R)	51st District
Rep. John V. Bara (D)	54th District
Rep. Daniel J. Troy (D)	60th District
Rep. Raymond E. Sines (R)	61st District
Rep. Sam Bateman (R)	66th District
Rep. Robert Netzley (R)	68th District
Rep. Jim Buchy (R)	73rd District
Rep. Joseph Haines (R)	75th District
Rep. Doug White (R)	77th District
Rep. Jon Myers (R)	78th District
Rep. Larry Manahan (R)	79th District
Rep. Randy Weston (D)	86th District
Rep. Lynn R. Wachtmann (R)	80th District
Rep. Jim Davis (R)	81st District
Rep. Charles R. Brading (R)	82nd District
Rep. Ed Core (R)	83rd District
Rep. Corwin M. Nixon (R)	84th District

Ohio—continued

Rep. Richard E. Rench (R)	90th District
Rep. Paul Mechling (D)	91st District
Rep. Ron Amstutz (R)	93rd District
Rep. Tom Johnson (R)	96th District
Rep. Jerry W. Krupinski (D)	98th District

Oklahoma

Sen. Trish Weedn (D)	15th District
Sen. Donald Jay Rubottom (R)	35th District
Sen. Helen Cole (R)	45th District
Sen. Mike Fair (R)	47th District
Sen. Howard H. Hendrick (R)	52nd District
Rep. Larry Ferguson (R)	35th District
Rep. Tony Kouba (R)	43rd District
Rep. Carolyn Coleman (R)	53rd District
Rep. Joan Greenwood (R)	54th District
Rep. Grover R. Campbell (R)	75th District
Rep. Raymond L. Vaughn, Jr. (R)	81st District
Rep. Tony Caldwell (R)	83rd District
Rep. William D. Graves (R)	84th District
Rep. Mary Fallin (R)	85th District
Rep. Robert Worthen (R)	87th District
Rep. Charles Key (R)	90th District
Rep. Dan Webb (R)	91st District
Rep. Tim Pope (R)	98th District
Rep. Ernest Istook (R)	100th District

Oregon

Rep. Walt Schroeder (R)	48th District

Pennsylvania

Sen. Edward W. Helfrick (R)	27th District
Sen. Noah W. Wenger (R)	36th District
Rep. Teresa E. Brown (R)	6th District
Rep. Thomas J. Fee (D)	9th District
Rep. David O. King (R)	17th District
Rep. Anthony M. DeLuca (D)	32nd District
Rep. Christopher K. McNally (D)	36th District
Rep. Richard D. Olasz (D)	38th District
Rep. Anthony L. Colaizzo (D)	48th District
Rep. Thomas A. Tangretti (D)	57th District

Pennsylvania—continued

Rep. Samuel H. Smith (R)	66th District
Rep. Leona Telek (R)	70th District
Rep. Andrew Billow, Jr. (D)	72nd District
Rep. Edwin G. Johnson (R)	80th District
Rep. Thomas Dempsey (R)	83rd District
Rep. Fred C. Noye (R)	86th District
Rep. Patrick E. Fleagle (R)	90th District
Rep. A. Carville Foster, Jr. (R)	93rd District
Rep. Thomas E. Armstrong (R)	98th District
Rep. John E. Barley (R)	100th District
Rep. Ronald S. Marsico (R)	105th District
Rep. Gaynor Cawley (D)	113th District
Rep. Edward Staback (D)	115th District
Rep. Thomas B. Stish (D)	116th District
Rep. Thomas M. Tigue (D)	118th District
Rep. Kevin Blaum (D)	121st District
Rep. Thomas R. Caltagirone (D)	127th District
Rep. Dennis E. Leh (R)	130th District
Rep. Jerry Birmelin (R)	139th District
Rep. Paul I. Clymer (R)	145th District
Rep. Peter R. Vroon (R)	157th District
Rep. Steve Friend (R)	166th District
Rep. Dennis M. O'Brien (R)	169th District
Rep. Gerard A. Kosinski (D)	175th District
Rep. John J. Taylor (R)	177th District
Rep. Connie McHugh (R)	184th District

Rhode Island

Sen. Maryellen Goodwin (D)	1st District
Sen. John R. O'Leary (D)	12th District
Sen. Michael J. Flynn (R)	29th District
Sen. Joseph A. Montalbano (D)	37th District
Sen. Helen M. Mathieu (D)	46th District
Rep. Thomas J. Rossi (D)	6th District
Rep. Charles F. Gould (D)	66th District
Rep. Frank J. Anzeveno (D)	70th District
Rep. Gaetano Parella (R)	90th District

South Carolina

Rep. Daniel T. Cooper (R)	10th District
Rep. Lewis Vaughn (R)	18th District
Rep. Mike Fair (R)	19th District

South Carolina—continued

Rep. H. Howell Clyborne (R)	20th District
Rep. Terry E. Haskins (R)	22nd District
Rep. Carole Wells (R)	34th District
Rep. Steve Lanford (R)	35th District
Rep. David Beasley (R)	56th District
Speaker *Pro Tempore*	
Rep. John W. Riser (R)	69th District
Rep. Richard M. Quinn, Jr. (R)	71st District
Rep. Roland Corning (R)	79th District
Rep. David Wright (R)	85th District
Rep. C. Lenoir Sturkie (R)	88th District
Rep. Henry Brown (R)	99th District
Rep. Ken Corbett (R)	107th District
Rep. Tom Keegan (R)	116th District
Rep. Roger M. Young (R)	117th District

South Dakota

Sen. Henry A. Poppen (R)	8th District
Sen. Gerald Lange (D)	10th District
Sen. Richard G. Belatti, M.D. (R)	13th District
Sen. Roger A. Porch (R)	27th District
Sen. Bob Haskell (R)	34th District
Sen. William J. Johnson (R)	35th District
Rep. Alfred A. Waltman (D)	2nd District
Rep. Howard L. Kennedy (R)	16th District
Rep. J.E. "Jim" Putnam (R)	19th District
Rep. Lola Schreiber (R)	24th District
Rep. Mike Shaw (R)	24th District
Rep. Kenneth McNenny (R)	26th District
Rep. Gary Lucas (D)	28th District
Rep. Harvey Krautschun (R)	31st District
Rep. Della M. Wishard (R)	35th District

Tennessee

Sen. Gene Elsea (R)	13th District
Sen. Douglas Henry (D)	21st District
Rep. Edna H. Tullos (R)	88th District
Rep. Richard H. Nuber (R)	94th District
Rep. Ed Haley (R)	95th District
Rep. Dan Byrd (D)	99th District

Texas

Sen. John N. Leedom (R)	16th District
Rep. Jerry Yost (R)	7th District
Rep. Chris Harris (R)	10th District
Rep. Dan Kubiak (D)	13th District
Rep. Ken Armbrister (D)	18th District
Rep. Tim Von Dohlen (D)	31st District
Rep. Jim Horn (R)	59th District
Rep. Warren Chisum (D)	84th District
Rep. Kim Brimer (R)	96th District
Rep. Ken Marchant (R)	99th District
Rep. Will Hartnett (R)	102nd District
Rep. Bill Blackwood (R)	105th District
Rep. Glenn Repp (R)	111st District
Rep. Gwyn Shea (R)	114th District
Rep. Talmadge Heflin (R)	149th District

Utah

Sen. LeRay L. McAllister (R)	15th District
Sen. C.E. "Chuck" Peterson (R)	16th District
Rep. Lee Allen (R)	1st District
Rep. Stephen M. Bodily (R)	3rd District
Rep. Evan L. Olsen (R)	5th District
Rep. Kevin Garn (R)	16th District
Rep. Irby N. Arrington (R)	39th District
Rep. Lloyd W. Frandsen (R)	45th District
Rep. Donald R. LeBaron (R)	58th District
Rep. Norman L. Nielsen (R)	60th District
Rep. Jeff Alexander (R)	62nd District
Rep. Bradley Johnson (R)	71st District
Rep. James F. Yardley (R)	73rd District
Rep. Robert A. Slack (R)	75th District

Vermont

Rep. Kittredge R. Haven (R)	Addison—1
Rep. Madeline Harwood (R)	Bennington—Rutland—2
Rep. Thomas J. McCormick (R)	Chittenden—8
Rep. Joan Conant (R)	Colchester 9–1
Rep. Betty M. Ferraro (R)	Rutland 6–1
Rep. Oreste V. Valsangiacomo, Sr. (D)	Washington 4–2

Virginia

Sen. Robert E. Russell, Jr. (R)	11th District
Sen. Charles T. Colgan (D)	29th District
Del. Stephen H. Martin (R)	67th District
Del. Robert F. McDonnell (R)	84th District

Washington

Sen. Linda A. Smith (R)	11th District
Sen. Ellen Craswell (R)	23rd District
Sen. Bob Oke (R)	26th District
Sen. Pam Roach (R)	31st District
Rep. Mike Padden (R)	4th District
Rep. Duane Sommers (R)	6th District

West Virginia

Sen. Charles V. Felton, Jr. (D)	15th District
Del. Joseph D. Parriott (R)	4th District
Del. Otis A. Leggett (R)	7th District
Del. Larry Border (R)	8th District
Del. Evelyn E. Richards (R)	16th District
Del. Kenny E. Partlow (D)	18th District
Del. Ann Calvert (R)	23rd District
Del. William H. Wallace (R)	25th District
Del. Eugene T. Wilson (D)	26th District
Del. Randy Schoonover (D)	33rd District
Del. Robert A. Schadler (R)	34th District

Wisconsin

Sen. Marvin J. Roshell (D)	23rd District
Rep. Wilfrid J. Turba (R)	27th District
Rep. William D. Lorge (R)	40th District
Rep. Susan B. Vergeront (R)	60th District
Rep. Leo R. Hamilton (D)	67th District
Rep. Marc C. Duff (R)	84th District

Wyoming

Sen. Allan D. Howard (R)	Big Horn County
Sen. James L. Applegate (D)	Laramie County
Sen. Michael J. Burke (R)	Natrona County
Rep. Samuel R. Dunnuck III (R)	Albany County
Rep. Sylvia Gams (R)	Big Horn County
Rep. Fred Harrison (D)	Carbon County
Rep. William M. Tibbs (R)	Converse County

Wyoming—continued

Rep. Gene Call (R)	Lincoln County
Rep. Richard Honaker (D)	Sweetwater County
Rep. Ron Micheli (R)	Uinta County
Rep. Ray Harrison (R)	Washakie County

Commonwealth of Puerto Rico

Sen. Jose Izquierdo-Stella (PDP)	At Large
Sen. Roberto Rexach-Benitez (NPP)	At Large
Sen. Nicolas Nogueras-Rivera (NPP)	At Large
Sen. Enrique Rodriguez-Negron (NPP)	At Large
Sen. Oreste Ramos (NPP)	1st District
Sen. Anibal Marrero-Perez (NPP)	2nd District
Rep. Angel Cintron (NPP)	At Large
Rep. Rosa Ramirez (NPP)	3rd District
Rep. Edison Misla-Aldarondo (NPP)	4th District
Rep. Carlos Lopez-Nieves (NPP)	7th District
Rep. Manuel Marrero-Hueca (NPP)	9th District
Rep. Arcadio Concepcion (PDP)	11th District
Rep. Jose Guillermo Rodriguez (PDP)	18th District
Rep. Benjamin Soto (PDP)	19th District
Rep. Harry Luis Perez (PDP)	20th District
Rep. Jose Varela (PDP)	29th District
Rep. Miguel Diaz-Tirado (PDP)	30th District
Rep. Gilberto Moreno-Rodriguez (R)	39th District

Territory of Guam

Hon. Joseph F. Ada (R), Governor
Hon. Frank F. Blas (R), Lt. Governor

Speaker Joe T. San Agustin (D)
Legislative Secretary Pilar C. Lujan (D)

Sen. Elizabeth P. Arriola (D)
Sen. Joseph George Bamba (R)
Sen. Anthony C. Blaz (R)
Sen. Madeline Z. Bordallo (D)
Sen. Herminia D. Dierking (D)
Sen. Edward R. Duenas (R)
Sen. Ernesto M. Espaldon, M.D. (R)
Sen. Marilyn D.A. Manibusan (R)
Sen. Martha Cruz Ruth (R)
Sen. Francisco R. Santos (D)
Sen. Thomas V.C. Tanaka (R)
Sen. Antonio R. Unpingco (R)

Additional *Amici*

Alabama

Sen. James T. Waggoner (R)	16th District
Sen. Chip Bailey (D)	29th District
Sen. Albert Lipscomb (R)	32nd District
Rep. Al Knight (R)	40th District
Rep. Jack Biddle III (R)	43rd District
Rep. Jim Carns (R)	46th District
Rep. Allen Sanderson (R)	47th District
Rep. John Hawkins (R)	48th District
Rep. Mark L. Gaines (R)	55th District

Connecticut

Rep. Eugene Migliaro (R)	80th District

Illinois

Sen. Sam Vadalabene (D)	56th District
Rep. Charles A. Hartke (D)	107th District

Kansas

Rep. Robert Grant (D)	2nd District
Rep. Richard R. Reinhardt (D)	8th District
Rep. Mary Jane Johnson (D)	36th District
Rep. William J. Reardon (D)	37th District
Rep. Tom Love (D)	38th District
Rep. Bruce F. Larkin (D)	63rd District
Rep. George R. Dean (D)	96th District
Rep. Darrel M. Webb (D)	97th District
Rep. Janice L. Pauls (D)	102nd District
Rep. Kent Campbell (D)	107th District
Rep. Lee Hamm (D)	108th District
Rep. John D. McClure (D)	119th District

Missouri

Rep. John Kauffman (D)	12th District
Rep. Ed. Ottinger (R)	70th District
Rep. W. Todd Akin (R)	85th District
Rep. W. (Bill) Hand (R)	90th District
Rep. William A. Raisch (R)	99th District
Rep. W. Zane Yates (R)	101st District
Rep. Wesley A. Miller (R)	108th District
Rep. Jim Froelker (R)	110th District
Rep. Donald Gann (R)	133rd District
Rep. Mark L. Richardson (R)	155th District

Montana

Sen. Dennis G. Nathe (R)	10th District
Rep. Mike Foster (R)	32nd District
Rep. Jim Rice (R)	43rd District

New Hampshire

Sen. Sheila Roberge (R)	9th District
Sen. Gordon J. Humphrey (R)	17th District

Oklahoma

Rep. Frank W. Davis (R)	31st District

Pennsylvania

Rep. Joe Steighner (D)	11th District
Rep. Susan Laughlin (D)	16th District
Rep. Frank J. Gigliotti (D)	22nd District
Rep. Ron Gamble (D)	44th District
Rep. Fred Trello (D)	45th District

South Dakota

Sen. Charles E. Flowers (D)	23rd District
Rep. Elmer Diedtrich (R)	25th District
Rep. Marie C. Ingalls (R)	26th District
Rep. John Koskan (R)	29th District
Rep. Elmer E. Flatt (R)	30th District

Texas

Rep. John Smithee (R)	86th District

Virginia

Rep. Robert Marshall (R)	17th District

Washington

Rep. James Hargrove (D)	24th District
Rep. Ron Carlson (R)	47th District

West Virginia

Sen. Thais Blatnik (D)	1st District
Sen. Larry Wiedebusch (D)	2nd District
Del. Kenneth R. Adkins (D)	17th District

Commonwealth of the Northern Marianas Islands

Sen. J.R. Sablan (R)	Saipan